

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



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B15  
74-2294

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**United States Court of Appeals**

FOR THE SECOND CIRCUIT

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TERESA M. BURNS, as Administratrix of the Goods,  
Chattels and Credits of GEORGE VINCENT BURNS,

*Plaintiff-Appellant,*

—against—

PENN CENTRAL COMPANY, n/k/a PENN CENTRAL  
TRANSPORTATION COMPANY,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**JOINT APPENDIX**

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ELKIND, LAMPSON & SABLE  
*Attorneys for Plaintiff-Appellant*  
122 East 42nd Street  
New York, N.Y. 10017

ROBERT M. PEET  
*Attorney for Defendant-Appellee*  
466 Lexington Avenue  
New York, N.Y. 10017



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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TERESA M. BURNS, as Administratrix of :  
the Goods, Chattels and Credits of  
GEORGE VINCENT BURNS, : Docket No. 74-2294

Plaintiff-Appellant, :

-against- :

PENN CENTRAL COMPANY, n/k/a PENN :  
CENTRAL TRANSPORTATION COMPANY, :

Defendant-Appellee.

-----x

RELEVANT DOCKET ENTRIES

DATE	PROCEELINGS
<u>1969</u>	
Oct. 14	Filed complaint and issued summons.
<u>1974</u>	
May 10	Filed consent order that Elkind, Lampson & Sable be substituted as attys for pltff. So ordered. Knapp, J.
May 20	Filed stip & order that the fee for outgoing attys & incoming attys, is to be determined at the conclusion of the litigation. Outgoing, attys shall be reimbursed for disbursements advanced by them in the sum of \$331.06) dollars upon the transfer of the file. Knapp, J.
May 22	Filed pltff's requests to admit.
Jun 19	Filed Deft's Answers to Pltff's Request to Admit.
Jun 19	Filed Deft's ANSWERS TO PLTFF's Requests to Admit.

Relevant Docket Entries

<u>DATE</u>	<u>PROCEEDINGS</u>
<u>1974</u>	
Jun 20	Filed Pltff's Requests to Admit.
Sep. 10	Before Knapp, J. Jury trial begun.
Sep. 11	Trial continued.
Sep. 12	" "
Sep. 13	" "
Sep. 16	" " Case was declared mistrial because of a hung jury.
Sep. 20	Filed Judgment: Ordered that the complaint is dismissed & the deft. have & recover its costs from the pltff. Knapp, J. Judg. Ent. Clerk Mailed notice. Ent. 9-23-74.
Sep. 26	Filed pltff's notice of appeal to the USCA from judgment dismissing, complaint on 9-20-74. Mailed copy to Robert M. Peet.
Oct. 4	Filed consent that a total of fourteen photographs serially designated, as pltff's exhibits by the court, were admitted into evidence at the trial, shall comprise a part of record for the purpose of pltff-appellant's appeal to the USCA.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

COMPLAINT

PLAINTIFF DEMANDS  
TRIAL BY JURY

Plaintiff, by JURON & MINZNER, her attorneys, complaining of the defendant, respectfully shows to this Court and alleges:

**AS AND FOR A FIRST CAUSE OF ACTION:**

**FIRST:** That prior to the commencement of this action, proceedings were had in the Surrogate's Court, Rockland County, and, by decree of said Court made on or about the 11th day of June, 1969, the plaintiff was issued Letters of Administration and was authorized to prosecute this action as Administratrix of the Estate of GEORGE VINCENT BURNS, Deceased.

**SECOND:** Plaintiff's action arises under the Act of Congress of April 22, 1903, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as the Federal Employers Liability Act (45 U.S.C.A. Sections 52-60), and the Act of Congress of March 2, 1893, 27 Stat. 531, Chapter 196, with amendments thereto, commonly known as the Federal Safety Appliance Act (45 U.S.C.A. Sections 1-16).

**THIRD:** That at all times hereinafter mentioned, the defendant was and still is a foreign corporation, doing business in the City and State of New York.

FOURTH: That at all times hereinafter mentioned, the defendant was engaged in the transportation of freight, mail and passengers between the State of New York and other states, by reason of which fact it was engaged in interstate commerce.

FIFTH: That at all times hereinafter mentioned, the defendant maintained and controlled and at the present time still maintains and controls certain railroad station tracks, platforms, trains and equipment, right of way, located on Park Avenue, in the vicinity of 126th Street, New York City.

SIXTH: That on or about the 15th day of March, 1969, the plaintiff's intestate was in the employ of the defendant as a conductor in the vicinity of the aforesaid station.

SEVENTH: That on the aforesaid date and time, the aforesaid stations, tracks, platforms, trains, equipment and right of way were owned, operated, maintained and controlled by the defendant, its agents, servants and employees.

EIGHTH: That by reason of the aforesaid, at all times hereinafter mentioned, the plaintiff's intestate was engaged in the furtherance of the interstate commerce business of the defendant.

NINTH: That on or about the 15th day of March, 1969, while the plaintiff's intestate was engaged in the performance of his duties as aforesaid, he was caused to sustain severe injuries which resulted in his death.

TENTH: That the aforesaid occurrence and the resulting injuries and death of the plaintiff's intestate were caused solely and wholly through the negligence of the defendant, its agents, servants and employees, and without any contributing negligence on the part of the plaintiff's intestate.

ELEVENTH: That the said plaintiff's intestate left him surviving his wife, this plaintiff TERESA M. BURNS, his issue TERESA MARIA BURNS; MARCELLA CATHERINE BURNS; JOYCE ELLEN BURNS; GEORGETTA MICHELE BURNS; CLAUDIA ANN BURNS; and an unborn infant, all of whom were dependent upon the deceased for their support.

TWELFTH: That this plaintiff has been damaged in the sum of One Million (\$1,000,000.00) Dollars, for the wrongful death of her deceased husband.

AS AND FOR A SECOND CAUSE OF ACTION:

THIRTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in the First Cause of Action of the complaint herein with the same force and effect as if herein set forth more fully.

FOURTEENTH: By reason of the foregoing occurrence, the plaintiff's intestate suffered severe and serious injuries to his head, body and limbs, resulting in his death.

FIFTEENTH: By reason of the foregoing, this plaintiff has been damaged in the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant on the First Cause of Action in the sum of One Million (\$1,000,000.00) Dollars and on the Second Cause of Action in the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars, together with the costs and disbursements of this action.

Dated: New York, N.Y.  
September 23, 1969

/s/ Edward S. Minzner  
JURON & MINZNER  
Attorneys for Plaintiff  
501 Fifth Avenue  
New York, N.Y. 10017  
OX 7-8484

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

SAME TITLE : 69 Civ. 4500

-----x ANSWER

Defendant, Penn Central Transportation Company, by its attorney, Thomas J. Smith, as and for its answer to the complaint herein states upon information and belief as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs "FIRST," "SECOND," "NINTH," "ELEVENTH" and "FOURTEENTH" of the complaint.

SECOND: Admits the allegations contained in Paragraphs "THIRD," "FOURTH," "FIFTH," "SIXTH," "SEVENTH" and "EIGHTH" of the complaint.

THIRD: Denies each and every allegation contained in Paragraphs "TENTH," "TWELFTH" and "FIFTEENTH" of the complaint.

FOURTH: As and for its answer to Paragraph "THIRTEENTH" of the complaint, defendant repeats, reiterates and realleges each and every answer to each allegation contained in the First Cause of Action of the complaint herein with the same force and effect as if herein set forth more fully.

FIFTH: As and for a first, separate and complete defense, defendant alleges that any injuries sustained by plaintiff's decedent on or about the 15th day of March, 1969, were caused solely by the negligence of the plaintiff's decedent, the negligence of the defendant contributing in no way thereto.

WHEREFORE, defendant demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, New York  
November 24, 1969

THOMAS J. SMITH  
Attorney for Defendant  
466 Lexington Avenue  
New York, New York 10017  
340-2530

TO: Juron and Minzner, Esqs.  
Attorneys for Plaintiff  
501 Fifth Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

69 Civ. 4500 (WK)

PLAINTIFF'S REQUESTS  
TO ADMIT

S I R S :

PLEASE TAKE NOTICE that plaintiff requests the defendant, within ten (10) days after service hereof, to make the following admissions for the purpose of this action only and subject to all pertinent objections of admissibility which may be introduced at the trial:

1. That the records of the defendant disclose train stoning incidents along the Park Avenue right-of-way in the City of New York between and including 151st Street and the face of the tunnel at 95th Street, between May 11, 1968 and February 25, 1969, as follows:

1968

May	11	149th Street	
	17	125th Street	Broken window & injury
	19	149th Street	Broken window
	25	140th Street	Broken window
	31	138th Street	Broken window & injury
June	9	99th Street	
	10	98th Street	
	10	Mouth of tunnel	
	10	129th Street	
	10	127th Street	1 window broken
	11	127th Street	1 window broken
	18	128th Street	
	19	106th Street	1 window broken
	19	101st Street	Broken window & injury
	24	97th Street	3 windows broken

1968

July	10	149th Street	1 window broken
	15	138th Street	2 windows broken
	15	138th Street	
	17	150th Street	Broken window & injury
	28	97th Street	1 window broken
	31	138th Street	1 window broken
Aug.	2	138th Street	1 window broken
	23	138th Street	Broken window & injury
	25	138th Street	
	25	138th Street	3 windows broken
	26	138th Street	
	27	100th Street	1 window broken
	28	138th Street	1 window broken
Sept.	2	130th Street	
	7	149th Street	
	8	138th Street Station	1 window broken
	8	138th Street Station	2 windows broken
	8	138th Street Station	4 windows broken
	8	138th Street Station	1 window broken
	10	96th Street	
	10	144th Street	3 windows broken
	11	99th Street	1 window broken
	19	103rd Street	
	19	149th Street	
Oct.	2	138th Street	
	14	102nd Street	
	18	149th Street	
	24	151st Street	Injury
Nov.	5	146th Street	1 window broken
	13	138th Street	
	29	138th Street	
Dec.	5	138th Street	1 window broken
	6	138th Street	
	7	149th Street	1 window broken

1969

Jan.	20	103rd Street	
Feb.	18	98th Street	1 window broken
	25	96th Street	1 window broken

2. That on March 15, 1969, and for many years prior thereto, Section 83 of the Railroad Law provided in substance as follows:

"No railroad corporation shall be liable for any injury to any passenger while on the platform of a car, \* \* \* in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of the passenger cars, then in the train, if there shall be at the time sufficient room for the proper accommodation of the passengers inside such passenger cars."

3. That in 1968 and up to March 15, 1969, a notice in conformity with §83 of the Railroad Law of the State of New York was posted in Car 1147 of Train 8748, and in a number of passenger railroad cars operated by the defendant on the Hudson Division.

4. That on March 15, 1969, there were adequate seating accommodations for all of the passengers aboard Train 8748.

5. That on March 15, 1969, and for a number of years prior thereto, the defendant published and distributed to all of its employees books containing Rules for Conducting Transportation and Safety Rules.

6. That none of the Rules of the defendant required passenger Trainmen or passenger Conductors to confine passengers to the interior portion of passenger trains, as opposed to the platforms of the cars, until the train came to a stop, except that Rule 400N-1 makes the Conductor

responsible for the safety and care of the trains and passengers.

7. That there were substantially more stoning incidents in the New York City area of Penn Central trains in 1968 than there were in 1967, and that in the year 1967 there were over 300 stoning incidents, over 290 windows broken, and over 30 injuries.

Dated: New York, N.Y.  
May 21, 1974

Yours, etc.

ELKIND, LAMPSON & SABLE  
Attorneys for Plaintiff  
122 East 42nd Street  
New York, N.Y. 10017

By /s/ Arnold B. Elkind  
A Member of the Firm

TO:

ROBERT M. PEET, ESQ.  
Attorney for Defendant  
466 Lexington Avenue  
New York, N.Y. 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK-----x  
SAME TITLE

69 Civ. 4500 (WK)

:  
DEFENDANT'S ANSWERS  
: TO PLAINTIFF'S  
REQUESTS TO ADMIT

Defendant, Penn Central Transportation Company, makes the following answers to Plaintiff's Requests to Admit dated May 21, 1974, subject, however, to all pertinent objections of admissibility which may be raised at the time of trial:

1. Defendant admits that its records disclose the following stoning incidents along the Park Avenue right-of-way in the Borough of Manhattan and in the Borough of The Bronx between and including 151st Street and the face of the tunnel at 96th Street, between May 11, 1968 and February 25, 1969:

On Saturday, May 11, 1968 at 11:25 AM, stonings were reported at 149th Street - no windows broken and no personal injuries reported.

On Friday, May 17, 1968 at 12:53 PM, train 253Y was reported stoned at 125th Street Station - 1 broken window and 1 personal injury reported.

On Sunday, May 19, 1968 at 3:19 PM, train 668 was reported stoned at 149th Street - 1 broken window and no personal injuries reported.

On Saturday, May 25, 1968 at 4:38 PM, train 737 was reported stoned at 140th Street - 1 broken window and no personal injuries reported.

On Friday, May 31, 1968 at 7:31 PM, train 270Y was reported stoned at 138th Street - 1 broken window and 1 personal injury reported.

On Sunday, June 9, 1968 at 5:57 PM, train 676 was reported stoned at 99th Street - 1 broken window and no personal injuries reported.

On Monday, June 10, 1968 at 5:29 PM, train 80Y was reported stoned at 98th Street - no personal injuries and no broken windows reported.

On Monday, June 10, 1968 at 6:42 PM, train 61 was reported stoned at the mouth of the tunnel - no personal injuries and no broken windows reported.

On Monday, June 10, 1968 at 8:05 PM, train 277Y was reported stoned at 129th Street - no broken windows and no personal injuries reported. Defendant denies the stoning of any train at 127th Street and Park Avenue on June 10, 1968, but admits that on that date at 9:01 PM, freight train SLX-1 was reported at 127th Street on the west side of New York City - 1 window cracked and no personal injuries reported.

On Tuesday, June 11, 1968 at 7:05 PM, train 765 was reported stoned at 127th Street - 1 broken window and no personal injuries reported.

On Tuesday, June 18, 1968 at 128th Street no train was reported to have been stoned.

On Wednesday, June 19, 1968 at 4:45 PM, train 465 was reported stoned at 101st Street - no windows broken and no personal injuries reported and at 3:22 PM that same day, train 465 was reported stoned at NK Tower at 106th Street - 1 window broken and no personal injuries reported. However, train 465 left Grand Central Terminal at 3:00 PM and arrived at Glenwood at 3:43 PM and therefore defendant disputes the accuracy of the stoning report of that train at 4:45 PM.

On Monday, June 24, 1968 at 8:37 PM, train 370 was reported stoned at 97th Street - 3 broken windows and no personal injuries reported.

On Wednesday, July 10, 1968 at 5:35 PM, train 256Y was reported stoned at 149th Street - 1 broken window and no personal injuries reported.

On Monday, July 15, 1968 at 7:54 PM, train 638 was reported stoned at 138th Street Station - 2 broken windows and no personal injuries reported.

On Monday, July 15, 1968 at 8:07 PM, train 952 was reported stoned at 138th Street Station - no broken windows and no personal injuries reported.

On Wednesday, July 17, 1968 at 6:49 PM, train 264Y was reported stoned at 150th Street - 1 broken window and 1 personal injury reported.

On Sunday, July 28, 1968 at 9:55 PM, train 30Y was reported stoned at 97th Street - 1 broken window and no personal injuries reported.

On Wednesday, July 31, 1968 at 6:02 PM, train 332Y was reported stoned at the 138th Street Station - 1 broken window and no personal injuries reported.

On Friday, August 2, 1968 at 8:22 PM, train 636 was reported stoned at 138th Street - 1 broken window and 1 personal injury reported.

On Friday, August 23, 1968 at 4:08 PM, train 541 was reported stoned at 138th Street - 1 broken window and 1 personal injury reported.

On Sunday, August 25, 1968 at 2:48 PM, a "passing train" was reported stoned at 138th Street - no broken windows and no personal injuries reported.

On Sunday, August 25, 1968 at 3:18 PM, train 75 was reported stoned at 138th Street - 3 broken windows and no personal injuries reported.

On Monday, August 26, 1968 at 2:12 PM, a "passing train" was reported stoned at 138th Street - no broken windows and no personal injuries reported.

On Tuesday, August 27, 1968 at 6:22 PM, train 945 was reported stoned at 100th Street - 1 broken window and no personal injuries reported.

On Wednesday, August 28, 1968 at 7:54 PM, train 272Y was reported stoned at 138th Street - 1 broken window and no personal injuries reported.

On Monday, September 2, 1968 at 5:35 PM, train 386 was reported stoned at 130th Street - no broken windows and no personal injuries reported.

On Saturday, September 7, 1968 at 8:05 PM, train 83Y was reported stoned at 149th Street - no broken windows and no personal injuries reported.

On Sunday, September 8, 1968 at 1:45 PM, "passing trains" were reported stoned at 138th Street - no broken windows and no personal injuries reported.

On Sunday, September 8, 1968 at 1:52 PM, train 725 was reported stoned at 138th Street - 1 broken window and no personal injuries reported; at 1:55 PM, train 75Y was reported stoned at 138th Street - 2 broken windows and no personal injuries reported; at 1:55 PM, train 230Y was reported stoned at 138th Street - 4 broken windows and no personal injuries reported; at 1:56 PM, train 987 was reported stoned at 138th Street - 1 broken window and 1 possible personal injury reported.

On Tuesday, September 10, 1968 at 5:28 PM, train 749 was reported stoned at 96th Street - no broken windows and no personal injuries reported.

On Tuesday, September 10, 1968 at 8:06 PM, train 277Y was reported stoned at 144th Street - 3 broken windows and no personal injuries reported.

On Wednesday, September 11, 1968 at 3:57 PM, train 541 was reported stoned at 99th Street - 1 broken window and no personal injuries reported.

On Thursday, September 19, 1968 at 4:54 PM, train 940 was reported stoned at 103 Street - no broken windows and no personal injuries reported.

On Thursday, September 19, 1968 at 6:48 PM, deadhead train 172 was reported stoned at 149th Street - no broken windows and no personal injuries reported.

On Wednesday, October 2, 1968 at 4:19 PM, "passing trains" were reported stoned at 138th Street - no broken windows and no personal injuries reported.

On Monday, October 14, 1968 at 8:53 PM, train 849 was reported stoned at 102nd Street - no broken windows and no personal injuries reported.

On Friday, October 18, 1968 at 6:00 PM, train 299Y was reported stoned at 149th Street - no broken windows and no personal injuries reported.

On Thursday, October 24, 1968 at 6:42 PM, train 246Y was reported stoned at 151st Street - 1 broken window and 1 personal injury reported.

On Tuesday, November 5, 1968 at 3:45 PM, train 938 was reported stoned at 146th Street - 1 broken window and no personal injuries reported.

On Wednesday, November 13, 1968 at 12:24 PM, train 459 was reported stoned at 138th Street Station - no broken windows and no personal injuries reported.

On Friday, November 29, 1968 at 4:12 PM, "passing trains" were reported stoned at 138th Street - no broken windows and no personal injuries reported.

On Thursday, December 5, 1968 at 2:20 PM, train 71Y was reported stoned at 138th Street - 1 broken window and no personal injuries reported.

On Friday, December 6, 1968 at 4:52 PM, "passing trains" were reported stoned at 138th Street - no broken windows and no personal injuries reported.

On Saturday, December 7, 1968 at 7:25 PM, train 61 was reported stoned at 149th Street - 1 broken window and no personal injuries reported.

On Monday, January 20, 1969 at 2:37 PM, train 234 was reported stoned at 103rd Street - no broken windows and no personal injuries reported.

Defendant can neither admit nor deny that on February 18, 1969 trains were stoned at 98th Street which resulted in 1 broken window since, after a diligent search, the record for that day cannot be located.

On Tuesday, February 25, 1968 at 8:25 PM, train 636 was reported stoned at 96th Street - 1 broken window and no personal injuries reported.

2. Admits.

3. Defendant is unable to admit or deny the contents of this request since no records are available and defendant is unable to locate any person who can verify this request. However, defendant believes that the facts requested in this request to admit are true.

4. Admits.

5. Admits.

6. Defendant objects to the form of this request for admission. However, defendant admits that its Rules for Conducting Transportation and its Safety Rules make no specific reference requiring its passenger trainmen and conductors to confine passengers to the interior portion of passenger trains until the train comes to a stop. Defendant further admits that Rule 400N-1 makes the conductor responsible for the safety and care of the train and

passengers and that other Rules for Conducting Transportation do contain directives relating to the duties of passenger trainmen with respect to the handling of folding steps, trap-doors and the protection of passengers using the same.

7. Defendant objects to this request for admission since defendant's attorney does not understand what area plaintiff intends to include in the description "the New York City area of Penn Central trains". Defendant further states that it is unable to admit or deny the facts referred to in this request since records for the years 1967 and 1968 are not available, although a diligent search has been made by defendant in an effort to locate such records. Defendant further states in response to this request for admission that following the merger of the New York Central Railroad and the Pennsylvania Railroad on February 1, 1968, stonings of trains in the State of New Jersey were reported to the New York Division.

Dated: New York, New York  
June 18, 1974

Yours, etc.

/s/ Robert M. Peet  
Robert M. Peet  
Attorney for Defendant  
466 Lexington Avenue  
New York, New York 10017  
Phone: 340-2530

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK-----x  
SAME TITLE69 Civ. 4500 (WK)  
:  
PLAINTIFF'S REQUESTS  
: TO ADMIT-----x  
S I R S :

PLEASE TAKE NOTICE that plaintiff requests the defendant, within ten (10) days after service hereof, to make the following admissions for the purpose of this action only and subject to all pertinent objections of admissibility which may be introduced at the trial:

1. That when George V. Burns died on March 15, 1969 his six daughters lost the benefit of his parental guidance as follows:

Faith	21 years
Claudia Ann	16 years
Georgette Michele	13 years
Joyce Ellen	11 years
Marcella Catherine	10 years
Teresa Marie	9 years

2. That if George V. Burns had continued to live his normal life expectancy and had continued in the employ of the defendant, his gross annual earnings to age 65 could have been as follows:

Balance of 1969	\$11,299.25
1970	15,298.36
1971	17,084.73
1972	18,656.94
1973	19,943.01
1974 through 1984	20,790.00 per year assuming that no additional increases are negotia- ted during the years 1975 to 1984

Dated: New York, N.Y.  
May 30, 1974.

Yours, etc.

ELKIND, LAMPSON & SABLE  
Attorneys for Plaintiff  
122 East 42nd Street  
New York, N.Y. 10017

TO:

By /s/ Arnold B. Elkind  
A Member of the Firm

ROBERT M. PEET, ESQ.  
Attorney for Defendant  
466 Lexington Avenue  
New York, N.Y. 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x 69 Civ. 4500 (WK)

SAME TITLE

: DEFENDANT'S ANSWERS  
: TO PLAINTIFF'S  
REQUESTS TO ADMIT

Defendant, Penn Central Transportation Company, makes the following answers to Plaintiff's Requests to Admit dated May 30, 1974, subject, however, to all pertinent objections of admissibility which may be raised at the time of trial:

1. Defendant objects to this request for admission on the ground that information necessary to answer this request is not within the knowledge of the defendant. However, defendant admits the truth of the facts stated in this admission based upon the following assumptions of fact:

A. That George V. Burns would have continued to live to the year 1990;

B. That had he lived to the year 1990, he would have continued to give to his daughters parental guidance;

C. That each of such named daughters would also have lived the respective 9 to 21 years referred to in this request.

2. Defendant admits that the earnings of George V. Burns, had he continued to live his normal life expectancy and had he continued in the employ of the defendant, could

have been as indicated in this request, but this admission is based upon the following assumptions of fact:

- A. That decedent's health continued to allow him to work regularly;
- B. That decedent would have continued to work overtime each year up to the year 1884;
- C. That decedent would not be absent from his regular assignments due to injury or other unforeseen events;
- D. That there were no decreases in salary;
- E. That there was no recession or depression in the railroad industry or other related industries;
- F. That decedent's job was not eliminated.
- G. That decedent's seniority would have enabled him to continue to work regularly in jobs wherein such earnings are a possibility;
- H. That Penn Central Transportation Company continues in existence to the year 1884 and its corporate existence is not dissolved as is presently contemplated by the Bankruptcy Court administering the estate of this defendant.

Dated: New York, New York  
June 18, 1974

Yours, etc.,

/s/ Robert M. Peet  
Robert M. Peet  
Attorney for Defendant  
466 Lexington Avenue  
New York, New York 10017  
Phone: 340-2530

VOL 2 Closed

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 TERESA M. BURNS, as Administra- : Before:  
5 trix of the Goods, Chattels : HON. WHITMAN KNAPP, D.J.,  
and Credits of : and a Jury.  
6 GEORGE VINCENT BURNS,

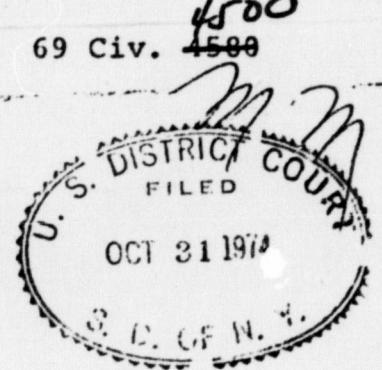
7 Plaintiff, :

8 vs. :

9 PENN CENTRAL CO., N/K/A  
PENN CENTRAL TRANSPORTATION  
10 CO.,

Defendant. :

4500  
69 Civ. 4500



11 New York, September 10, 11, 12, 1974

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25 30

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK3 -----x  
4 :  
5 TERESA M. BURNS, as Administratrix:  
of the Goods, Chattels and Credits:  
of GEORGE VINCENT BURNS,  
6 :7 Plaintiff, :  
8 vs. :  
9 :10 : 4500  
11 : 69 Civ. 450012 PENN CENTRAL CO., N/K/A :  
13 PENN CENTRAL TRANSPORTATION CO., :  
14 :15 Defendant. :  
16 -----x  
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24 :  
25 :  
11 BEFORE: HON. WHITMAN KNAPP,  
12 District Judge  
13 And a Jury  
14 September 10, 1974  
15 2:15 P.M.  
16 APPEARANCES:  
17 ELKIND, LAMPSON and SABLE, ESQS.  
18 Attorneys for the Plaintiff  
19 BY: ARNOLD ELKIND, ESQ., of Counsel  
20 ROBERT M. PEET, ESQ.,  
21 Attorney for the Defendant  
22 BY: HENRY HERBERT, ESQ., of Counsel  
23  
24  
25

2 (In the Robing Room)

3 MR. HERBERT: First of all the defendant requests  
4 that we try the case on liability first, without any reference  
5 to wages and money lost and other items of damage.

6 THE COURT: You oppose that vigorously?

7 MR. ELKIND: Yes, I do, your Honor. I don't see  
8 any advantage in terms of efficiency or time. The case is  
9 going to be a relatively short one. It is certainly not  
10 going to save any time.

11 THE COURT: It certainly won't save any time.

12 MR. ELKIND: I must say I have been trying FELA  
13 cases for, I guess, about 30 years, 25, 30 years, and I  
14 can't remember one case that has ever been bifurcated.  
15 Every FELA case I have been in has been tried in one piece.

16 MR. HERBERT: In this court here where I have been  
17 practicing I have had --

18 MR. ELKIND: This is my personal experience.

19 MR. HERBERT: I have had more cases on a split  
20 kind of trial basis than the other. The only case where I  
21 have tried both liability and damages was where the liability  
22 was obvious and I was not really contesting it.

23 MR. ELKIND: The damages in this case -- it is  
24 not as though you have a case where there is a lot of pain  
25 and suffering. He was killed and it is a question of his

1 rd/1f/3

2 wage loss and contributions to his family. I don't know  
3 why that should be the subject of a separate trial.

4 THE COURT: I think we should have one trial.

5 MR. HERBERT: May I just take exception to the  
6 Court's ruling on that.

7 Another thing, your Honor, the defendant's  
8 position in this case is that evidence of stone throwing  
9 incidents is not admissible, and I address myself to that  
10 point in my memorandum to the Court.

11 In addition, there is a reference here by Mr.  
12 Elkind to section 83 of the Railroad Law. I submit that  
13 that is not relevant or material to the issues in this law-  
14 suit.

15 I would, therefore, request that in opening state-  
16 ments no reference be made to stone throwing incidents and  
17 that no reference be made in opening statements to Section  
18 83 of the Railroad Law.

19 THE COURT: I don't really see how 83 of the Rail-  
20 road Law has any relevance.

21 MR. ELKIND: We are not suing under 83 of the Rail-  
22 road Law.

23 THE COURT: I don't see that it is relevant.

24 MR. ELKIND: My position, your Honor, if I may  
25 restate it, is that it shows a statutory recognition by the

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2 legislature of the State of New York that the platform of  
3 a moving passenger car is a more dangerous place for a person  
4 to be than the interior of the car.

5 THE COURT: I don't think this is the danger that  
6 was intended to be guarded against. I will sustain the  
7 defendant on that.

8 But the stone throwing case that you rely on  
9 doesn't seem to me to be -- doesn't seem to me to support --

10 MR. HERBERT: I didn't follow what the Court  
11 was saying when you said the stone throwing case.

12 THE COURT: The case you rely on is with the firm  
13 of Levitt.

14 MR. HERBERT: This is the Hartel case. I relied  
15 also on the other cases that I have cited on that point with  
16 respect to the relevancy of stone throwing incidents.

17 Certainly it is a different crime. I certainly submit to  
18 the Court that kids who throw stones to break windows on  
19 trains is certainly different than kids who are shooting  
20 rifles killing trainmen. The crimes are distinguishable  
21 and different. There is no similarity with respect to the  
22 crime.

23 THE COURT: The thing is this: Is there danger  
24 of an assault one way or another that the railroad should  
25 have guarded against.

3 MR. HERBERT: It is not an assault one way or  
4 another. As the Second Circuit said, assault by armed  
5 criminals. That is exactly what we are dealing with here,  
6 your Honor, an assault by an armed criminal.

7 THE COURT: A fellow who throws a stone is a  
8 criminal also. He is armed in a different way.

9 MR. HERBERT: I can't agree. They are not similar  
10 in character of the act. You can just take a stone and  
11 lob it against a train and due to the speed of the train,  
12 50 miles an hour, it is the speed of the train which may  
13 cause the damage by breaking the window of the train.

14 Here where you have a slow moving train with a  
15 sniper on a roof top aiming a rifle, as is claimed here,  
16 and shooting Mr. Burns, that is totally different. The  
17 circumstances of the crimes are certainly different.

18 THE COURT: How would the stone throwing --  
19 how would he protect himself from stone throwing by keeping  
20 him off the platform? Stones are thrown at windows,  
21 aren't they?

22 MR. ELKIND: They are thrown at the train.  
23 Generally some go through windows, broken windows. A few  
24 of the reports indicate that windows were broken. The  
25 interior of the car presumably, even though there are windows,  
is a far safer place than being on the platform with the door

1 rd/lf/6

2 32A

3 open.

4 Many of these windows, incidentally, your Honor,  
5 are shatterproof glass or other substance.

6 MR. HERBERT: They are now but they were not  
7 then, Mr. Elkind. That is the period of time we are dealing  
8 with. I think the incidents are totally dissimilar in  
9 character, in time, in place.

10 THE COURT: In time they are not dissimilar. They  
11 are about the same time.

12 MR. HERBERT: The admissions were made with  
13 respect to a ten month period before that, but the  
14 character -- the incidents are not substantially similar  
15 to warrant their admissibility or their relevancy or their  
16 materiality. If the Court would read the Hartel case  
17 again and read the Callus case, which I referred to --

18 THE COURT: Which is the Callus case?

19 MR. HERBERT: That is a Second Circuit case. Let  
20 me see if I have my notes here with respect to the stone  
21 throwings.

22 In the Hartel case, the Second Circuit held that  
23 to establish a case the plaintiff had to show the danger  
24 to her husband from armed criminals was or should have been  
25 foreseen by the defendant. Once that was shown a further  
showing that the defendant was negligent in whole or in part

1 rd/lf/7

2        33A

3        in failing to minimize its danger.

4            THE COURT: That was the Hartel case.

5            MR. HERBERT: That's correct. The Court used the  
6 words further on that the plaintiff made no offer of evidence  
7 which would have shown that there was any unusual danger,  
8 and then referred that the occurrences to be admitted must  
9 be such that they should have called or did call to the  
employer's attention the special dangers, the special dangers.

10          Now, the special dangers they are referring to are  
11 the dangers from armed criminals which was being dealt  
12 with. They said the special dangers found at a particular  
13 location. The location here is danger to a trainman in the  
14 vestibule of a train in the vicinity of 128th, 129th Street.

15          THE COURT: Well, you are limited to that general  
area.

16          MR. HERBERT: And unless it can be shown that the  
stonings were a special danger at the particular location.

17          You are saying the particular location here was  
also the location of the vestibule.

18          MR. ELKIND: The particular location that was in-  
19 volved was the vestibule of the train as it moved through  
20 the area.

21          MR. HERBERT: That's correct, the area being 128th  
22 and 129th Street and injuries occurring in the vestibule.

2 MR. ELKIND: The point where he may have theoretically  
3 gotten out on the platform of the car, which would have been  
4 on 150th Street. So in the admissions we run from 150th  
5 Street to the face of the tunnel at 96th Street, on the  
6 theory this is the general area and it would be representative  
7 of the area in question.

8 MR. HERBERT: I disagree with that, your Honor,  
9 because the character of neighborhoods change from block to  
10 block.

11 MR. ELKIND: You can be sophist about this, Mr.  
12 Herbert, and it would be impossible. I might just as well  
13 walk out of the courtroom.

14 THE COURT: I'll allow the stone throwing. It  
15 is a question of fact whether they show a general hostility  
16 in the neighborhood.

17 MR. HERBERT: I will take exception to that.  
18 There must be a showing of substantially similar conditions.

19 If I may address myself a little further, your  
20 Honor. You must appreciate that the area that we are dealing  
21 with, your Honor, is an elevated track.

22 Now, when you refer to stonings on 96th Street,  
23 that is not elevated track. That is a different character  
24 from the layout here. The tracks at 102nd Street reach  
25 street level on one side and at 99th Street reach street level

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2 on the other and then they go into the tunnel.

3 I know that there have been stonings where the  
4 contour of the land is such that they are on the same level  
5 or above the trains. For that reason I submit that --

6 THE COURT: I think it should be limited to where  
7 it is elevated track. That seems sound.

8 MR. HERBERT: Also, I would ask your Honor to limit  
9 it to the area that we are speaking of here, 128th Street,  
10 129th Street area, within that neighborhood.

11 THE COURT: From coming across the bridge until  
12 they get to where the track is no longer elevated I think is  
13 a definable area.

14 MR. HERBERT: Your Honor, we are dealing here with  
15 blocks and blocks and blocks.

16 THE COURT: My recollection of them is they are the  
17 same general character.

18 MR. HERBERT: But the neighborhoods change, your  
19 Honor.

20 THE COURT: Not that much.

21 MR. HERBERT: Well, I referred to a citation in my  
22 memorandum of law where in the circuit court for the Seventh  
23 Circuit, I believe it was, your Honor, stated quite clearly  
24 that this is a material element. That was Sue, S-U-E, versus  
25 Chicago Transit Authority, 279 Fed. 2d 418.

2 There it was a suit by a passenger who was injured  
3 by a rock thrown through an open window in one of defendant's  
4 buses. In that lawsuit the plaintiff on appeal from a  
5 jury verdict claim there was error in refusal of the trial  
6 court to direct the defendant to answer certain interrogatories.  
7 The Seventh Circuit said that was not error. They said,  
8 "Nor would the information sought by the interrogatories,  
9 defendant was not required to answer, have been relevant. It  
10 was remote in both time and place. It would not have es-  
11 tablished notice of danger at the site of the incident in-  
12 volved."

13 THE COURT: I think the site here is the Harlem  
14 area where the track is elevated.

15 MR. HERBERT: Harlem is a big area.

16 THE COURT: I understand. You have an exception.

17 MR. HERBERT: "The defendant operator is a common  
18 carrier in a city of nearly four million people and over  
19 many miles of routes utilizing surface, subway and elevated  
20 facilities. Character of neighborhoods in such a large  
21 city change in no more than a few blocks and may vary in a  
22 short period of time."

23 THE COURT: I think for the purposes of this  
24 suit I will limit it to where it is an elevated track, but  
25 that elevated track I think is sufficiently homogeneous for

2 the purposes of this suit. You have your exception.

3 MR. HERBERT: I would like to register my exception,  
4 your Honor.

5 THE COURT: All right.

6 MR. ELKIND: Your Honor, for the record, since you  
7 have ruled, I assume you have ruled on section 83, the  
8 irrelevancy of section 83. I wanted to note my exception  
9 for the record to that.

10 THE COURT: You have your exception.

11 MR. ELKIND: I am excused from introducing or  
12 attempting to introduce any evidence in that regard.

13 THE COURT: You have every possible exception.  
14 You have offered it in evidence, it has been refused, you  
15 have asked for a charge and that has been refused. You  
16 asked to be able to open and sum up on it and that has been  
17 refused. If you can think of any other way, you may put it  
18 in the record.

19 MR. ELKIND: I feel very protected at this moment,  
20 your Honor.

21 MR. HERBERT: As I say, your Honor, with respect  
22 to stone throwing business being admitted in this lawsuit  
23 I will have to except to that because they are not substantially  
24 the same, different areas, different times. There has been  
25 no showing that there was any --

2 MR. ELKIND: Can we start now?

3 MR. HERBERT: I register my exception for what I  
4 said before and for the reasons in my trial memorandum which  
5 I would like the Court to mark as a court exhibit.

6 THE COURT: All right.

7 \* \* \* \* \* (In Open Court)

8 MR. ELKIND: I call Charles Ruhs, R-U-H-S.

9 C H A R L E S        R U H S,        called as a witness on behalf  
10 of the Plaintiff, having been first duly sworn, was  
11 examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ELKIND:

14 Q You are here pursuant to a subpoena, is that  
15 correct?

16 A Correct.

17 Q And you work for the defendant, Penn Central?

18 A Yes, I do.

19 Q And what is your job?

20 A Right now I'm a conductor on the Penn Central  
21 Railroad.

22 Q On the Hudson Division?

23 A On the Hudson Division, yes.

24 Q And were you a trainman or an assistant conductor  
25 or a brakeman in passenger service in March of 1969?

1 rd/1f/13 Ruhs-Direct

2 A I was the assistant conductor -- supposed to have  
3 been the assistant conductor on that train.

4 Q On the train?

5 A I was not there that evening. You asked a question.  
6 May I answer?

7 Q You may be a little ahead of me.

8 A You are asking me a question and I wish you would  
9 rephrase it.

10 Q You were working for a railroad as an assistant  
11 conductor, that is 'he question.

12 A I worked as a conductor, assistant conductor and  
13 a trainman, yes.

14 Q You had all of those jobs in March of 1969, conductor,  
15 assistant conductor, trainman?

16 A I would say yes, on and off.

17 Q On and off. And were you assigned or called to  
18 cover train 8748 on March 15, 1969?

19 A Yes, I was.

20 MR. HERBERT: Your Honor, may I just object to the  
21 relevancy of the testimony that is being offered? I don't  
22 think there is any claim that the train was improperly equipped  
23 or improperly manned.

24 THE COURT: What is the relevancy?

25 MR. HERBERT: I object to it as not being relevant.

1 rd/lf/14

Ruhs-Direct

2 May we approach the Bench on it, your Honor?

3 THE COURT: Yes.

4 (At the side bar)

5 MR. ELKIND: If your Honor pleases, my understanding  
6 is -- and you can correct me if I'm wrong, Mr. Herbert --  
7 my understanding is that this man was supposed to be on this  
8 train in addition to the decedent.

9 THE COURT: How would that have altered the situa-  
10 tion?

11 MR. ELKIND: Because the work would have been  
12 divided between two men and there would have been a shorter  
13 period on the platform. I also want to establish this ques-  
14 tion of custom and practice.

15 THE COURT: Well, I don't see whether he should  
16 have been on or not is relevant.

17 MR. ELKIND: You don't think it is relevant?

18 MR. HERBERT: It is not relevant at all. There is  
19 no claim there was any negligence in having one man not appear  
20 on the train.

21 MR. ELKIND: The whole theory here is the period of  
22 time. Everything revolves around the period of time he was  
23 on that platform and in a vulnerable position. If there had  
24 been another --

25 THE COURT: I'll exclude that but you can ask it

1 rd/1f/15

2 Ruhs-Direct

3 for custom and practice if you want.

4 MR. HERBERT: You mean the custom and practice  
5 with respect to handling trains?

6 THE COURT: Yes.

7 MR. HERBERT: Yes, but I will object to the testi-  
8 mony that he was or should have been on the train.9 MR. ELKIND: I'm making a tender because I really  
10 don't know what he will say, but to protect my record the  
11 tender is that I propose to ask this witness whether or not  
12 he was assigned to train 8748, whether he was supposed to  
13 be a part of the crew which ~~consisted of~~ consisted of  
14 Conductor McGeoch, Mr. Burns, the trainman, and Mr. Ruhs,  
15 and that he failed to appear for his job and that he was  
16 disciplined by the railroad for failing to appear on the  
17 job, and that if he had appeared there would have been two  
18 brakeman and McGeoch performing services.19 My suggestion is that the additional manpower may  
20 be considered by the jury as bearing on the lack of care on  
21 the part of the railroad.22 THE COURT: I will sustain the objection. You have  
23 an exception.24 MR. HERBERT: There is no claim here of insufficient  
25 manpower that I saw in the lawsuit.

THE COURT: You say there is no claim.

2 MR. HERBERT: I don't see the relevancy.

3 THE COURT: I sustain your objection.

4 (In Open Court)

5 BY MR. ELKIND:

6 Q Now, Mr. Ruhs, you were not on train 8748 the night  
7 that Mr. Burns was killed, is that correct?

8 A I was not.

9 Q You were not?

10 A I was not.

11 Q Had you covered that train or been on that train  
12 on previous occasions?

13 A Yes.

14 Q Am I correct that that train leaves Croton at  
15 about 6:02?

16 A Offhand I don't remember the time.

17 Q You don't remember. Well, let me show you a time-  
18 table and see if we can't agree.

19 MR. HERBERT: I have a timetable here, Mr. Elkind.

20 MR. ELKIND: That's all right.

21 MR. HERBERT: I have the original timetable here.

22 THE COURT: I imagine it has been stipulated what-  
23 ever the time the train left.

24 MR. ELKIND: Perhaps that would be the easiest way.  
25 I don't want to clutter up the record. You may check me on

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this.

Q Train 8748 left Croton at 6:10 P.M., does that sound right?

A It sounds right, yes.

Q And it makes stops at Ossining, Scarborough, Tarrytown, Irvingtown, Dobbs Ferry, Hastings, Glenwood, which is in Yonkers, and Yonkers, which is in Yonkers, and Ludlow which is in Yonkers, right?

A Yes.

Q Then it makes one more stop and is scheduled to leave Marble Hill at 6:50, does that sound right?

A That sounds right.

Now, at Marble Hill --

THE COURT: Is Marble Hill the station just across the river?

THE WITNESS: Still in the Bronx, your Honor.

Q Is it in the Bronx?

A Marble Hill is right in the Bronx.

Q      Marble Hill station is in the Bronx?

A Yes.

MR

MR. HERBERT: The timetable indicates we have the  
225th Street.

MR. ELKIND: Do you know whether that is Manhattan or the Bronx?

1 rd/lf/18 Ruhs-Direct

2 THE WITNESS: It is in the Bronx. Not over  
3 the river yet.

4 THE COURT: The only stations in Manhattan  
5 are Grand Central and 125th Street.

6 Q Now, at the Marble Hill station in 1969, was that  
7 a low-level platform?

8 A Yes, all low-level platforms.

9 Q Low level. Now, will you tell the jury, if you  
10 remember, how many cars are in train 8748 ordinarily on a  
11 Saturday night?

12 MR. HERBERT: I will object, your Honor. I don't  
13 see the relevancy of how many cars were ordinarily on. We  
14 are only concerned with the number of cars on this occasion.  
15 How many cars there were or may have been on other occasions  
16 has no relevancy at all to this lawsuit and I will object.

17 Q Am I correct there are two cars on the train on a  
18 Saturday night?

19 A According to the testimony, yes. I wasn't there.

20 THE COURT: It is stipulated there are two cars?

21 MR. HERBERT: I will stipulate there were two cars  
22 on this train.

23 THE COURT: That is the car with a motorman and  
24 another man?

25 THE WITNESS: Yes.

1 rd/1f/19 Ruhs-Direct

2 Q And that is an M.U. car?

3 A Yes, both are.

4 Q In other words, there was no locomotive on the  
5 tracks?

6 A No.

7 Q Is the station platform on the right-hand side  
8 as you go south at Marble Hill?

9 A If you are going east, yes. Track four, yes.

10 Q Going toward New York?

11 A Going toward New York the station is on the right.  
12 Yes.

13 Q When you are on track two at 125th Street, the  
14 station is a low-level platform station and that is on your  
15 right, is that correct?

16 A That's right.

17 Q Now, is it the custom and practice for men doing  
18 the kind of work that you were doing to close the trap door  
19 and close the outside door to the vestibule when you leave  
20 Marble Hill?

21 A For the safety of the passengers, yes.

22 Q It is the custom and practice to do that?

23 A Yes.

24 Q And that means that when you get to 125th Street you  
25 have to go back on out into the vestibule, open up the door and

1 rd/lf/20 Ruhs-Direct

2 then open up the trap door to the steps to go down, is that  
3 correct?

4 A That's correct.

5 Q Now, do you have or did you have in 1969 a custom  
6 and practice with respect to at what point before the 125th  
7 street station you would go out onto the platform for the  
8 purpose of opening the trap door?

9 MR. HERBERT: May we first establish whether or  
10 not, your Honor, this witness has ever opened up trap doors  
11 prior to the 125th Street?

12 THE COURT: Was it part of your job going into the  
13 125th Street station?

14 THE WITNESS: Yes.

15 THE COURT: He wants to know when you did it.

16 THE WITNESS: As you come over the bridge at 138th  
17 Street, one of us will be by the doors, I can't say I will  
18 be there --

19 Q One of you what?

20 A One of the train crew will be there or probably  
21 two of the train crew would be there and they would open up  
22 the vestibule doors and make the announcements to the passen-  
23 gers 125th Street. As you do, you go up to another door and  
24 open the trap. You do it almost like driving a car.

25 THE COURT: The point is you do that after crossing

1 rd/1f/21 Ruhs-Direct

2 the bridge.

3 THE WITNESS: Yes.

4 THE COURT: Before you get to the station?

5 THE WITNESS: That's right.

6 Q And you have seen other trainmen do the same thing?

7 A Yes.

8 Q And that is the way it is done, is that correct?

9 A Yes.

10 Q Or the way it was done in 1969?

11 A Yes.

12 MR. ELKIND: I have no further questions.

13 CROSS EXAMINATION

14 BY MR. HERBERT:

15 Q Going back to 1969, Mr. Ruhs, in March, were you  
16 on the -- did you hold a regular job?

17 A Yes, I owned that job, assistant conductor.

18 Q You would work how many trips in and out of New  
19 York on the average week, Mr. Ruhs?

20 A Two round trips.

21 Q Two round trips a week?

22 A No, a day. You said during the week.

23 Q Just so I have it clear, Mr. Ruhs, you would work  
24 an average of about two round trips a day?

25 A Yes.

1 rd/1f/22 Ruhs-Cross

2 Q That would mean two trips down from Croton to Grand  
3 Central, a trip back, then a second trip down and another  
4 trip back?

5 A That's right.

6 THE COURT: How many average days a week did you  
7 work?

8 THE WITNESS: We did that five days a week and  
9 on Saturday and Sunday at that time we worked a round trip,  
10 one down and one back.

11 THE COURT: But how many actual days of the  
12 week would you do it?

13 THE WITNESS: Seven days. I work seven days normally.  
14 It is almost like the extra list.

15 Q This is going back to 1969 now.

16 A I would say so, yes.

17 Q You worked -- did you work off the extra list or a  
18 regular basis?

19 A At that time I couldn't hold the extra list or I  
20 would have been on it.

21 Q You couldn't hold the extra list?

22 A Yes.

23 Q You were assistant conductor, is that the list you  
24 were on?

25 A I was in the capacity of an assistant conductor on

1 rd/lf-23

Ruhs-Cross

2 that train.

3 Q I'm not speaking of any particular train, I'm  
4 speaking about the list you were on. Were you on the roster  
5 of assistant conductors?

6 A When I could hold it, yes. There were many times  
7 I was used as a conductor because I was in that station  
8 where I was also promoted as conductor but at that time I  
9 couldn't hold a conductor job. They had used me at times.

10 Q Can you tell me, Mr. Ruhs, whether at any time in  
11 the trips that you took prior to March 15, 1969, into  
12 Manhattan and out of Manhattan, in the area of 125th Street  
13 on the elevated tracks, whether you or your train were  
14 stoned?

15 MR. ELKIND: I object to that, your Honor.

16 MR. HERBERT: I will agree with Mr. Elkin. I  
17 will withdraw the question with the understanding that stoning  
18 is not relevant to this lawsuit.

19 MR. ELKIND: I object to that understanding. I  
20 just don't think that is proper cross examination. I didn't  
21 ask the witness anything about stonings. Therefore, he is  
22 opening up a new area. If he wants to make him his witness,  
23 he may.

24 THE COURT: You will make him your witness on this  
25 issue if you would pursue it. You can pursue it if you would

1 rd/1f/24

Ruhs-Cross

2 like to if you want to make him your witness.

3 Q Mr. Ruhs, you have worked as a trainman for the  
4 railroad for how many years in passenger service?

5 A Since 1948, September 7, 1948.

6 Q And during that period of time you have operated  
7 on trains passing the area between 125th Street and 130th  
8 Street in Manhattan, is that right?

9 A That's right.

10 Q And on those occasions have you had occasion to  
11 open or close trap doors, open or close trap doors as trains  
12 are arriving or departing from the station?

13 A Yes.

14 Q Did you, with your experience, ever consider it  
15 a hazard to yourself to open or close those trap doors when  
16 the trains were arriving or departing from the 125th Street?

17 MR. ELKIND: Objection, your Honor. What he  
18 considered to be hazardous or a hazard has no relevancy here.

19 THE COURT: I think he is establishing his ex-  
20 perience. His views might not have relevance.

21 He is making him his own witness.

22 MR. ELKIND: Yes, I understand that, your Honor.

23 A I will say no.

24 MR. HERBERT: Thank you, Mr. Ruhs.

25 REDIRECT EXAMINATION

1 rd/1f/25 Ruhs-Redirect

2 BY MR. ELKIND:

3 Q Mr. Ruhs, you say that you couldn't hold the job  
4 on the extra list but that if you could have you would have,  
5 is that right?

6 A Right.

7 Q And do I understand you to mean by that that you  
8 did not have sufficient seniority, you hadn't worked for  
9 the railroad long enough to have the privilege of working  
10 the extra list, that is what that means, is that right?

11 A Yes.

12 Q Now, Mr. Herbert asked you some questions. He  
13 asked you about your opinion as to whether or not opening  
14 up the trap doors was hazardous between 130th Street and  
15 126th Street where the station begins, and you indicated that  
16 you didn't think so, is that right?

17 A That's true.

18 Q Were you familiar or did you know of stonings in  
19 that neighborhood that had taken place before March of 1969,  
20 did the railroad inform you about that?

21 MR. HERBERT: That neighborhood being 125th to  
22 130th Street?

23 MR. ELKIND: Yes.

24 MR. HERBERT: Thank you.

25 THE COURT: The question is: had you heard of any

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2 stonings up there?

3 THE WITNESS: We are trying to define the streets,  
4 I believe. No.

5 Q You hadn't heard?

6 A Not between 130th and 125th Street.

7 Q If you had known, if Mr. Herbert had included in  
8 his questions as a fact, is it hazardous to open the trap  
9 doors between 130th Street and 125th Street, if he included  
10 in that that there were stonings in that area?

11 THE COURT: There is no evidence of that yet.

12 MR. HERBERT: I object to the form of that question,  
13 your Honor.

14 Q Did you know that the railroad has admitted in  
15 this case that its records disclosed the following stoning  
16 incidents along the Park Avenue right-of-way in the Borough  
17 of Manhattan and in the Borough -- in the Borough of Manhattan  
18 between May 11, 1968 --

19 THE COURT: Between what streets?

20 MR. ELKIND: I'm coming to the streets, your  
21 Honor.

22 Q -- and February 25, 1969, that on Saturday, May  
23 25, 1968 --

24 MR. HERBERT: I will object to that, your Honor.  
25 Not in the area in question.

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Ruhs-Redirect

2 THE COURT: Can I see your copy of the stipulation?

3 MR. ELKIND: Yes, your Honor. I don't see why  
4 there should be any question about that. 140th Street.

5 (At the side bar)

6 THE COURT: May 25th, 140th Street. What do you  
7 propose to read? Let's number these things. Let's number  
8 these one, two, three, four, five, six, seven, eight, nine,  
9 ten, eleven, twelve, thirteen. For the moment let's start  
10 with them. What ones do you propose to read now?

11 MR. ELKIND: Two, six.

12 MR. HERBERT: I object to six, your Honor. Not  
13 relevant.

14 THE COURT: Why is six not relevant?

15 MR. HERBERT: That is not in the vicinity of 128th  
16 and 129th Street.

17 THE COURT: Eight is already the lower track, no  
18 longer elevated, so that is out. Eight is the mouth of  
19 the tunnel and that is no longer elevated. That doesn't  
20 count.

21 MR. ELKIND: This counts but there is no number  
22 for it, unless it is nine.

23 THE COURT: We will call it 8-A.

24 MR. HERBERT: This is not relevant. It is over on  
25 the west side.

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2 THE COURT: 8-A.

3 MR. ELKIND: That certainly is relevant, your Honor,  
4 number fourteen. Then number eleven -- no.

5 THE COURT: How did that one happen to get in there?

6 MR. HERBERT: He asked me about that.

7 MR. ELKIND: Twelve, 101st Street.

8 MR. HERBERT: I object to that. That is right  
9 down there where --

10 MR. ELKIND: Come on.

11 THE COURT: It has already started to go down.

12 MR. HERBERT: That is not relevant.

13 THE COURT: That is out then.

14 MR. ELKIND: Somehow, your Honor, I think there  
15 ought to be a better defined record of your rulings than  
16 this. Perhaps we can do it in chambers after the session.17 THE COURT: Maybe I can just ask him if this changes  
18 his views.

19 MR. HERBERT: I will object to that.

20 THE COURT: I don't think we need to go all through  
21 these things.22 MR. HERBERT: May I inquire what you are going to  
23 do?24 THE COURT: I'm going to say there was certain  
25 evidence over the period of years stones were thrown at some

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2 of these trains and windows broken. Does that change his  
3 views about the danger?

4 MR. HERBERT: I will object to that. For goodness  
5 sakes, the plaintiff is represented by competent counsel.  
6 I don't think it is appropriate for the judge to go in there  
7 and ask questions of the witness.

8 THE COURT: If counsel is competent that doesn't  
9 mean the judge is incompetent.

10 MR. HERBERT: I am not suggesting that, your  
11 Honor. We are speaking now in this area and how many  
12 instances are you referring to, over what period of time?

13 THE COURT: Let's see if he has heard of them and  
14 whether they affect his opinion.

15 MR. HERBERT: May I make one more point for the  
16 record, please? I will object to anything about stoning be-  
17 cause when I tried to inquire there was an objection and it  
18 was sustained.

19 MR. ELKIND: When you did what?

20 MR. HERBERT: When I inquired into it it was objected  
21 to and sustained.

22 MR. ELKIND: It was leading and sustained. You  
23 were leading and suggesting.

24 MR. HERBERT: I will also note my objection to the  
25 relevancy.

2 (In Open Court)

3 THE COURT: Mr. Ruhs, the point of all this dis-  
4 cussion that was going on, you testified that in your judg-  
5 ment what you were doing was not dangerous, opening the trap  
6 door in the manner you have described, is that correct?

7 THE WITNESS: I would say so, yes.

8 THE COURT: Apparently, and we may get later on into  
9 the details of it, apparently there had been instances of  
10 stones being thrown at trains in that area and occasionally  
11 windows being broken. Had you ever heard of that?12 THE WITNESS: I don't know what street you are  
13 talking about, your Honor.

14 THE COURT: On the Park Avenue area.

15 THE WITNESS: Parts of it, yes.

16 THE COURT: You heard of it?

17 THE WITNESS: I had it happen to me.

18 THE COURT: Would that change your views as to  
19 whether it was dangerous to treat --20 THE WITNESS: I can't say 130th Street. It was  
21 going over the other side of the river. Between 130th and  
22 125th Street, I think that was in question at the time.  
23 That is the area I stated before that I hadn't heard of, no.

24 THE COURT: You hadn't heard of any in that area?

25 THE WITNESS: No. The other areas, yes. 96th

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2 Street, the Park Avenue tunnel.

3 MR. HERBERT: I will object to this. That is a good  
4 mile and a half away.

5 THE WITNESS: The judge asked me.

6 THE COURT: What happens in the tunnel has nothing  
7 to do with it --

8 THE WITNESS: That is the only vicinity.

9 THE COURT: In other words, you hadn't heard of  
10 any stonings in this area?

11 THE WITNESS: The area in question, no. I haven't  
12 heard of any.

13 THE COURT: Okay. And the net result was you  
14 didn't find anything in your judgment at the time these  
15 trains were being operated, you didn't think it was a  
16 dangerous procedure?

17 THE WITNESS: Would you rephrase that? I didn't  
18 get that.

19 THE COURT: You testified as the train was coming  
20 into the station you would open the vestibule door, then you  
21 would open the trap door and then you would stand there as  
22 the train was coming in.

23 THE WITNESS: That's right, your Honor.

24 THE COURT: And in your judgment you found that an  
25 acceptable procedure?

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2 THE WITNESS: Yes. I testified before, yes.

3 THE COURT: Did you hear what was going on?

4 (All jurors indicate in the affirmative)

5 BY MR. ELKIND:

6 Q My question is, Mr. Ruhs, first, did anybody in  
7 the railroad ever tell you about stonings in the area be-  
8 tween 125th Street and 138th Street?

9 A No.

10 Q All right. Second question, in giving your answers  
11 to whether or not there was a hazard in doing the work that  
12 you described to the judge in that particular area, would  
13 your answer have been different if you had been told that  
14 there had been stonings in that area?

15 A I would say it would be hazardous, yes.

16 MR. ELKIND: That is all.

17 RECROSS EXAMINATION

18 BY MR. HERBERT:

19 Q Mr. Ruhs, you have been in passenger service for,  
20 you said, some 20 odd years before this particular occurrence,  
21 this date.

22 A Since 1948.

23 Q 1948. And you have been opening and closing trap  
24 doors as trains arrive and depart from 125th Street station,  
25 is that right?

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2 A That's right, yes.

3 Q Have you ever been stoned as you have been opening  
4 or closing trap doors?

5 MR. ELKIND: Your Honor, please, I don't think  
6 that is a proper question.

7 MR. HERBERT: He has experience, your Honor.

8 THE COURT: I'll allow it.

9 Have you ever been?

10 THE WITNESS: Not in that area.

11 Q As you were closing trap doors preparing to come  
12 into 125th Street or leave 125th Street, have you ever been  
13 stoned?

14 A No.

15 Q Have you ever been shot at with a gun in that  
16 area?

17 A No.

MR. HERBERT: That is all I have.

MR. ELKIND: Thank you, Mr. Ruhs.

20 (Witness Excused)

21 MR. ELKIND: Your Honor, please, at this time I  
22 would like to offer as Plaintiff's Exhibits 1-A, B, C, D,  
23 E, F, G, H and I a series of photographs that have been  
24 examined by counsel which were taken by the New York City  
25 Police Aviation Department on March 22, 1969. Each of these

3 pictures shows the right-of-way of the defendant's railroad  
4 tracks over Park Avenue. Each picture has an arrow identify-  
5 ing New York, which direction is New York, and many of the  
pictures have --

6 MR. HERBERT: The pictures speak for themselves.

7 MR. ELKIND: I just want to let the jury know what  
8 these markings are. There are markings showing the street  
9 numbers, cross street numbers. And counsel has no objection.

10 MR. HERBERT: I didn't realize there were that  
11 many. May I just look at them again?

12 (Pause)

13 MR. HERBERT: No objection.

14 (Plaintiff's Exhibits 1-A through 1-I are received  
15 in evidence.)

16 MR. ELKIND: May I invoke your Honor's guidance  
17 as to what the best way would be of submitting these to the  
18 jury? Just let them look at it? I think my explanation has  
19 been adequate.

20 THE COURT: I think you have told them what it is  
21 about and you may pass it to them.

22 I don't think you have to stop while they look at  
23 them.

24 MR. ELKIND: I don't think so, your Honor, either.

25 THE COURT: During our interruptions they can look

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2 at them.

3 (Pause)

4 MR. ELKIND: Your Honor, we have agreed to stipulate  
5 that the decedent was following the usual custom and practice  
6 in performing the work that he was doing at the time that  
7 he was killed.

8 MR. HERBERT: That is opening and closing the  
9 trap doors and he was.

10 MR. ELKIND: Right.

11 MR. HERBERT: If Mr. Forbes would have taken the  
12 stand he would have so testified.

13 MR. ELKIND: Yes.

14 THE COURT: How long had that practice been in  
15 effect?

16 MR. HERBERT: As long as I have been with the  
17 railroad, your Honor.

18 THE COURT: At least ten years, I assume.

19 MR. HERBERT: I have been there sixteen years.  
20 I'm sure it is longer than that.

21 THE COURT: You think ten years is long enough  
22 so it is stipulated that, ladies and gentlemen, the deceased  
23 was following the regular practice of the railroad which had  
24 been going on for at least ten years in the manner in which  
25 he opened and closed these vestibule doors and trap doors.

2 MR. HERBERT: May I just have a moment, your Honor?

3 THE COURT: Yes.

4 (Pause)

5 MR. ELKIND: Your Honor, I would like to read to  
6 the jury, before calling the next witness, Rule 400N-1 of  
7 the rules of the Penn Central for conducting transportation.

8 THE COURT: Any objection to that rule?

9 MR. HERBERT: Let me see, your Honor. I have to  
10 find it first.

11 MR. ELKIND: I am particularly concerned with the  
12 second paragraph of that rule. That is all I intend to  
13 read.

14 MR. HERBERT: I will read it.

15 (Pause)

16 MR. HERBERT: All right, Mr. Elkind.

17 THE COURT: No objection?

18 MR. HERBERT: No objection of reading the second  
19 paragraph of Rule 400N, your Honor.

20 THE COURT: Proceed.

21 MR. HERBERT: N-1.

22 MR. ELKIND: The rule is entitled "Conductors."

23 "Conductors have general charge of the train to  
24 which assigned and all persons employed thereon are subject  
25 to their instructions. They are responsible for the prompt

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2 "movement, safety and care of their respective trains and  
3 the passengers and commodities carried for the vigilance  
4 and conduct of the men thereon and for the prompt reporting  
5 to the superintendent of conditions that interfere with the  
6 prompt and safe movement of trains."

7 Now, I would like to call Mr. McGeoch.

8 P E T E R J. M C G E O C H, called as a  
9 witness on behalf of the plaintiff, having been first  
10 duly sworn, was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. ELKIND:

13 MR. ELKIND: Your Honor, may we approach the Bench  
14 before I start questioning this witness?

15 THE COURT: Yes.

16 (At the side bar)

17 MR. ELKIND: If your Honor please, I want to  
18 claim the privilege of examining Mr. McGeoch as a hostile  
19 witness. I have taken his deposition. He is the man that  
20 we claim to be derivatively responsible for the negligence  
21 of the railroad.

22 I have never spoken to him except to take his exami-  
23 nation before trial. I think Mr. Herbert will tell you,  
24 he spent yesterday, in Mr. Herbert's office yesterday. Under  
25 those circumstances and -- although you haven't made any

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— 64A

2 objection, I would like the privilege of leading him and I  
3 don't want to run into,- and if I run into some surprises  
4 I don't want to be bound.

5 MR. HERBERT: Of course I object. I had him in my  
6 office yesterday because he had not executed his deposition.  
7 There is authority in this circuit for the proposition that  
8 there is no reason to suppose that a regular employee will  
9 be more favorable to the railroad than to his fellow  
10 employee union members.

11 THE COURT: In this case he is trying to make him  
12 responsible.

13 MR. HERBERT: That doesn't --

14 THE COURT: We will proceed under the regular  
15 rule.

16 MR. HERBERT: The fact he is trying to make him  
17 responsible for the accident doesn't make him a hostile  
18 witness.

19 THE COURT: We will proceed.

20 MR. HERBERT: I will object to any leading ques-  
21 tions, your Honor.

22 (In Open Court)

23 BY MR. ELKIND:

24 Q Mr. McGeoch, by whom are you employed? Who do you  
25 work for?

1 rd/1f/39

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2 A Penn Central Railroad.

3 THE COURT: You worked for the New York Central  
4 before it became Penn Central?

5 THE WITNESS: Yes, sir.

6 Q What is your job?

7 A Passenger conductor now.

8 Q And were you the passenger conductor on train 8748  
9 that left Croton at 6:10 P.M. on March 15, 1969?

10 A I believe if you look it up it was 6:05 P.M.

11 Q Was it 6:05?

12 A Yes.

13 Q Well, 6:05, 6:10. The timetable says 6:10 but  
14 let's not quibble.15 MR. HERBERT: I will object to that. The timetable  
16 says 6:05 from New York Croton, not Croton. Let's check it  
17 out.18 THE COURT: It doesn't make any difference. You  
19 were on that train?

20 THE WITNESS: Yes.

21 THE COURT: It doesn't make any difference. He  
22 was on the train.23 Q Mr. McGeoch, you were conductor on train 8748 that  
24 left Croton on Saturday, March 15th, at 6:10 P.M., is that  
25 right?

2 A That's right.

3 Q That train consisted of two cars, right?

4 A Right.

5 Q Is there any question in your mind?

6 A I work so many trains it is hard to remember if it  
7 was two cars. I'm pretty sure that is all there was, two.

8 Q And this was a Saturday night?

9 A Yes.

10 Q Right.

11 A Yes.

12 Q And you were the man under the rule who was in  
13 charge of the safety of that train?

14 A Right.

15 Q Is that right?

16 A Yes, sir.

17 Q And did you have your wife with you that night?

18 A Yes, I did.

19 Q And what was the purpose of having your wife along?

20 MR. HERBERT: Objection, your Honor, not relevant  
21 to this lawsuit, what the purpose of having her on the  
22 train or anyone.23 THE COURT: I don't see the relevancy unless you  
24 contend that made the train unsafe.

25 MR. HERBERT: Are you so contending?

1 rd/1f/41

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2 MR. ELKIND: Perhaps it was an element in it.

3 THE COURT: I take it you had your wife there  
4 because she wanted to get to New York?

5 THE WITNESS: Yes.

6 Q And these cars were M.U. cars, is that right, Mr.  
7 McGeoch?

8 A Yes.

9 Q Now, your crew that night was an engine man and  
10 one trainman?

11 A That's right.

12 Q Are you having any trouble hearing me, Mr. McGeoch?

13 A No -- yes, a little bit.

14 Q A little bit?

15 A You lean down sometimes.

16 Q I beg your pardon.

17 A Sometime you seem to face down.

18 Q Now, what was the name of the engine man?

19 A John J. Brown.

20 Q What was the name of the other man you had with  
21 you?

22 A George V. Burn -- Burns.

23 Q And what was Mr. Burn's job that night? What was  
24 his job title that night?

25 A Brakeman, I presume. Brakeman.

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2 Q And he was not your regular brakeman, was he?

3 A I don't recall if I had a regular man.

4 THE COURT: You don't recall if you had a regular  
5 brakeman?6 THE WITNESS: I don't recall if I had a regular  
7 man or that I would get somebody off the list.8 Q Well, now, the man that was here just a few  
9 minutes ago, Mr. Ruhs, he was your assistant conductor,  
10 is that right?11 MR. HERBERT: Objection, your Honor. Are we  
12 speaking of the night in question? Whether Mr. Ruhs was  
13 his assistant conductor on the night in question?

14 MR. ELKIND: I mean on train 8748.

15 MR. HERBERT: I don't know if this was the man's  
16 regular train. Why don't you establish this?

17 THE COURT: Was this your regular train?

18 THE WITNESS: Yes.

19 THE COURT: Do you remember if Mr. Ruhs was the  
20 regular?21 THE WITNESS: I forget if Mr. Ruhs was a regular  
22 on that train.

23 Q You just don't remember?

24 A It would be only on a Saturday.

25 Q That is a Saturday night special, 8748, it only

1 rd/lf/43

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2 runs one night a week and that was your job, among others,  
3 right?

4 A Yes.

5 Q Now, when did you meet with Mr. -- when and where  
6 did you meet with Mr. Burns on the evening of March 15th?7 A Specifically I don't know if I met him in the  
8 shack --

9 Q In the shack where?

10 A In Croton, New York, or in the parking lot, but it  
11 would be in the area of Croton, New York station.12 Q Would that be about a half hour or so before the  
13 train left?

14 A Yes.

15 Q Do you recall whether or not you had ever worked  
16 with Mr. Burns, the decedent before?

17 A I've worked with him, yes.

18 Q In passenger service on another occasion, once or  
19 twice perhaps?

20 A Yes.

21 THE COURT: How many times, if you remember?

22 THE WITNESS: Specifically I can't tell you dates.  
23 I just know he was on the train with me.

24 THE COURT: All right.

25 Q On this particular night did you have any conversation

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2 with him or any discussion on what work he was to do or did  
3 you just assume that he knew his job?

4 A I probably asked him what's new, how things going.  
5 You know what we're going to get, you know assuming that  
6 two cars. You know, it is a yard.

7 Q I'm having trouble hearing you.

8 A It is a yard with cars and we have to know which  
9 one is ours, walk in and get on, make sure the light's on.

10 THE COURT: I take it you have no specific recollec-  
11 tion, just reconstructing what you would normally do?

12 THE WITNESS: Yes, what we would normally do when  
13 we got together and get the train ready.

14 THE COURT: Do you give to anyone any assignments  
15 or instructions when you have a two-car train or do you  
16 assume they will do their job?

17 THE WITNESS: Unless they are new men. There  
18 isn't that much to do, you know. You only have to put on  
19 the lights, the markers and make sure the air conditioner  
20 is on or the heat.

21 Q And you collect the fares?

22 A Not at the Croton, New York.

23 Q Well, I mean on the trip into Grand Central Station,  
24 one of the duties that you and whoever is working with you is  
25 to collect the fares and look at the passes, is that right?

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2           Q     And the only other duty they have, once the train  
3     is under way, is to prepare the -- announce the arrival of  
4     the station, right?

5           A     Yes.

6           Q     And then prepare the car for entrance and exit at  
7     low-level platforms, right?

8           A     Yes.

9           Q     So you had no discussion or any instructions that  
10    you recall you gave to Mr. Burns on the night of the 15th,  
11    is that fair?

12          A     I don't recall making a specific instruction.

13          Q     Were you in 1969 a full time passenger trainman  
14    on the Hudson Division, Mr. McGeoch?

15          A     Yes.

16          Q     And that means that you spent your entire working  
17    life at that time as a passenger trainman?

18          A     Yes.

19               THE COURT: Trainman or conductor?

20          Q     Well, either as a conductor or assistant conductor.

21          A     On the trains anyway.

22          Q     Is that right?

23          A     Yes.

24          Q     During any of your trips prior to March 15, 1969,  
25    did anyone in supervision ever say anything to you about

2 stonings along the right-of-way?

3 MR. HERBERT: Objection, your Honor. Let's confine  
4 ourselves to the particular area. The area we are involved  
5 with in any lawsuit I think we have established is the area  
6 of 125th Street to 130th Street.

7 THE COURT: Anybody ever talk to you about incidents  
8 of anybody having thrown stones at a train in that area  
9 that you can remember now?

10 THE WITNESS: I can't remember anything official,  
11 no.

12 Q Nobody ever spoke to you?

13 A I don't ever recall.

14 Q What is the method, if any, whereby supervision  
15 or management communicates to you as a conductor in charge  
16 of the safety of the train anything that they would want you  
17 to do or anything that they would want you not to do? How  
18 did they get the word to you?

19 MR. HERBERT: Is this just generally?

20 MR. ELKIND: In 1969.

21 MR. HERBERT: Generally?

22 MR. ELKIND: Yes.

23 A Generally it would be bulletin boards. That would  
24 cover 90 percent of it.

25 If they wanted me specifically, they would have

2 somebody meet the train at a platform and give you a message,  
3 or you could call the tower and ask them why are you holding  
4 us, why don't you give us a signal and he would tell you what  
5 it would be.

6 Q Supposing they wanted to get word to all of the  
7 conductors on the Hudson Division, would they post a notice  
8 on the bulletin board?

9 MR. HERBERT: Your Honor, I will object to that.  
10 How would he know what management is going to do?

11 THE COURT: I take it what you are trying to  
12 establish is they never gave any instructions that people  
13 shouldn't conduct themselves as this plaintiff did conduct  
14 himself on that day, is that it?

15 MR. ELKIND: Yes.

16 THE COURT: I assume that is stipulated.

17 MR. HERBERT: I think we have stipulated that Mr.  
18 Burns was performing his duties the normal, customary  
19 fashion.

20 MR. ELKIND: Usual and customary fashion.

21 THE COURT: You are trying to establish that the  
22 railroad never told him to do it any differently?

23 MR. ELKIND: Yes.

24 THE COURT: And you stipulate to that?

25 MR. HERBERT: And I'll stipulate to that.

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2 THE COURT: All right.

3 Q Now, does the railroad, besides having a bulletin  
4 board, do they also publish timetables that are different  
5 than the timetables which are distributed to the public?

6 A Yes.

7 Q Do those timetables from time to time contain  
8 bulletins or notices to conductors for certain areas, of  
9 conditions in certain areas?

10 A There are stipulations and rules, of course, in  
11 these books.

12 Q You are talking about the timetables?

13 A Yes, but nothing to what we are referring to.

14 Nothing to what we are referring to or what you are referring  
15 to, in that sense. It wouldn't be in the timetable.

16 Q There wasn't anything in the timetable about  
17 stonings, but are there from time to time notices given in  
18 the timetables that are distributed to the employees that do  
19 contain directions on how to do work at particular times or  
20 in particular areas, isn't that one of the functions of the  
21 timetable?

22 MR. HERBERT: Objection to the form of the question,  
23 your Honor.

24 THE COURT: I don't see it. It is perfectly  
25 obvious if the railroad had wanted to give instructions as to

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2 how he should do this job they could have and they didn't,  
3 and that is stipulated. I don't think the details as to  
4 all the way they could have given those instructions has  
5 anything to do with it.

6 Q There came a time when your train left Marble  
7 Hill, is that right?

8 A That would be right.

9 Q On the 15th. And at that time you had two cars  
10 in your train, right?

11 A Right.

12 Q And am I correct that at the front end of the train  
13 you had the trainman, so you didn't have the door open on  
14 the front end of the train, is that right?

15 A The front of the train would be --

16 THE COURT: So no passengers could get on or off  
17 there.

18 THE WITNESS: Right.

19 Q Am I correct that you locked the back end?

20 A Yes, we usually snap that.

21 Q That was snapped?

22 A And hasped.

23 Q So that meant that you were only using the vestibule  
24 or the platform in the back of the front car and in the front  
25 of the second car?

2 MR. HERBERT: At what location, Mr. Elkind?

3 MR. ELKIND: On the trip down from Croton.

4 MR. HERBERT: Including 125th Street?

5 MR. ELKIND: Including the entire trip.

6 MR. HERBERT: I'll object to that because I'm  
7 sure, as Mr. Elkind knows from this man's deposition, there  
8 are occasions where you use one and two traps. Let's confine  
9 ourselves to particular stations.

10 THE COURT: At 125th Street do you use one trap or  
11 two?

12 MR. ELKIND: Your Honor, I haven't said anything  
13 about traps. I wish counsel would let me develop the evi-  
14 dence from the witness without jumping. All I'm talking about  
15 is the use of the platforms. I have established through the  
16 witness, to review, your Honor, that the platform at the front  
17 end was being used by the engine man, the platform at the  
18 rear was locked off, so that the two areas that were available  
19 were the vestibule and the back of the front car and the  
20 vestibule in the front of the second car, is that true?

21 THE WITNESS: That's true.

22 MR. ELKIND: That is all I have asked him.

23 Q Now, when you came to Yonkers station, did you use  
24 one or two traps? In other words, did you use both trap doors  
25 or just one trap door?

2 A I truly can't remember.

3 Q Do you recall whether you used one or two at Ludlow?

4 A Probably, probably one because Ludlow would not  
5 be a much used station. This would be supposition.

6 THE COURT: Does it make any difference?

7 MR. HERBERT: I can't see the relevance.

8 THE COURT: Five years ago I wouldn't know if I had  
9 a door open or two open. It is hard.

10 MR. HERBERT: Are you asking whether it makes any  
11 difference whether they had one or two traps?

12 THE COURT: At Ludlow.

13 MR. ELKIND: I am establishing a procedure, your  
14 Honor.

15 THE COURT: I don't see that it makes any difference  
16 to this lawsuit whether they opened one or two traps at  
17 Ludlow or anywhere else except 125th Street.

18 MR. ELKIND: I don't think it does either --

19 THE COURT: Why waste time then?

20 MR. ELKIND: Do you think it is a waste of time?

21 THE COURT: The poor man doesn't remember what  
22 happened in '69.

23 MR. ELKIND: I think the fact that he doesn't  
24 remember, which is understandable, is of some significance.

25 THE COURT: If you do, then establish it.

2 Do you remember any of the stations except 125th  
3 Street whether they had one or two traps open?

4 THE WITNESS: Not really.

5 Q You don't remember anything except 125th Street?

6 A Remember?

7 Q Whether there were one or two staircases that you  
8 used?

9 A No.

10 Q At 125th Street do you remember one or two at 125th  
11 Street?

12 A There was only one.

13 Q And that you are swearing to?

14 THE COURT: Obviously something happened there  
15 and that is why he remembers it. What are you doing?

16 MR. HERBERT: That is an unfair comment and I  
17 except to that, your Honor.

18 THE COURT: What is the point? He doesn't remember  
19 what happened in 1969 on routine stationstops and he does  
20 remember what happened where there was an emergency. What is  
21 strange about that?

22 Q Now, when you got to Marble Hill you were sitting  
23 or you were in the front car, is that correct, first car?

24 A At Marble Hill?

25 Q After you left Marble Hill.

1 rd/1f/53

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McGeoch-Direct

2 A I may have been in the first, the second or both.

3 Q So you don't remember?

4 A I couldn't swear.

5 Q And you passed 138th Street -- there is a station  
6 at 138th Street, isn't there? Not that you stopped at it  
7 but there is a station at 138th Street?

8 A No more. There used to be.

9 Q You didn't stop at it, of course. And then there  
10 is a bridge over the Harlem River, right?

11 A Yes.

12 Q Now, at that time when you passed 138th Street  
13 station or when you went over the 138th Street bridge, do you  
14 remember where you were in the train?

15 A I believe I was picking up the hat checks in the  
16 first car, the head car.

17 THE COURT: What kind of checks?

18 THE WITNESS: Seat checks. I believe it now.

19 Q Where was Mr. Burns at that time?

20 A If I recall correctly, he was up talking to Johnny  
21 Brown.

22 THE COURT: He is the motorman, you say?

23 THE WITNESS: Yes.

24 THE COURT: That is not the right word for it.

25 What is it?

2 THE WITNESS: Engine man.

3 THE COURT: Engine man, yes.

4 Q Did there come a time when he came back from the  
5 head of the front car?

6 A Toward the rear?

7 Q Yes.

8 A Yes.

9 Q Do you remember at what point on the trip he came  
10 back from the head end?

11 A We approached 125th Street and I couldn't swear  
12 exactly where we were, but I would say -- guessing -- 129th,  
13 130th, 131st, some place, I don't know. But to give him  
14 ample time to get to 125th Street and stop.

15 Q Did he pass by you while you were in the front car  
16 at some point?

17 A I believe he did.

18 Q You gave a statement right after his death, did  
19 you not, to the police?

20 A I believe so.

21 Q Where were you within the first car when Mr. Burns  
22 passed you going to the rear vestibule?

23 A I would assume about 35 feet from the door, 35.

24 THE COURT: From the back door?

25 THE WITNESS: About 35 or 40 feet.

2 Q 35 or 40 feet?

3 THE COURT: From the back door?

4 THE WITNESS: From the back door.

5 You asked me when did George walk by me.

6 Q Where were you?

7 A Where was I, and I'd say about almost halfway up  
8 the car maybe. I'm not sure, see?9 THE COURT: How much longer? I notice the time  
10 is getting late.11 THE WITNESS: I was in the front car. I wasn't  
12 up at the front end and I wasn't at the extreme tail end.  
13 So I was in between.

14 THE COURT: How much longer do you think?

15 MR. ELKIND: I think it would be better if I  
16 started with the witness tomorrow morning then.17 THE COURT: You can't finish in the next two,  
18 three minutes?

19 MR. ELKIND: I don't think so.

20 THE COURT: Ladies and gentlemen, ten o'clock  
21 tomorrow morning. Don't come into the courtroom. Go directly  
22 into the jury room. There may be other things going on in the  
23 courtroom which may or maynot have any relevance to this  
24 case. We will try to send for you as close to ten o'clock  
25 as we can. We try to operate on time in this court. Sometimes,

1 rd/lf/55a

— 82A

2 as happened today, the lawyers have a legal problem which  
3 has to be solved before we start but try to be on time.

4 Ten o'clock tomorrow morning.

5 (Jury Excused)

6 (Adjourned to September 11, 1974, at 10:00 A.M.)

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83A

2 TERESA M. BURNS

3 vs.

4 PENN CENTRAL CO.

4500  
69 Civ. 4500

5 September 11, 1974  
6 10:00 A.M.

7 (Robing Room Discussion)

8 THE COURT: Now, on this business of stoning,  
9 I have concluded that I will admit incidents of stoning  
10 between 102nd Street and 132nd Street, that being the line  
11 in Manhattan where it is elevated. It is about a mile and a  
12 half. In that case as you cited about the bus -- what  
13 is the name of that case?

14 MR. HERBERT: The bus case was Sue versus the  
15 Chicago Transit Authority, your Honor. But the case I  
16 would rely upon with respect to the situs would be Hartel.

17 MR. ELKIND: Hartel is direct authority for the  
18 judge's ruling.

19 THE COURT: Either authority for or against. We  
20 will find out.

21 MR. HERBERT: In the Hartel case Judge Levet ex-  
22 cluded all the evidence of prior holdups because they were  
23 not at the Mineola station.

24 THE COURT: No point in arguing. You have your  
25 exceptions.

2 MR. HERBERT: Your Honor, with respect to the  
3 admissibility of stone throwings, you will recall that when  
4 we were in chambers before opening statements and we dis-  
5 cussed this I excepted to the admissibility of stonings for  
6 the reasons set forth in my memorandum of law.

7 THE COURT: That exception still stands.

8 MR. HERBERT: That would be also because there  
9 has been no proof here that the tort which caused the death  
10 of Mr. Burns was an intentional tort.

11 THE COURT: I think there has been proof of that.

12 MR. HERBERT: I don't know what proof there was.

13 THE COURT: It just happened. I think it was more  
14 probable than not that it was intentional.

15 MR. HERBERT: That it was a deliberate shooting  
16 of this man? I don't recall any evidence on that.

17 THE COURT: It just happened. A man was shot. I  
18 think it was more probable than not that he was aimed at, that's  
19 all.

20 MR. HERBERT: It would be equally probable that  
21 the gun went off accidentally.

22 THE COURT: I don't find that. On the basis that  
23 when somebody gets shot it is more probable than not that he  
24 was aimed at than it was an accident. You may disagree with  
25 that. Of all the people in the world that have been shot I

1 rd/lf/3

2 - 85A

3 think most of them have been aimed at. Therefore, all we  
4 know that this man was shot and I think it is more probable  
5 than not that he was aimed at. I think that is all you  
have to prove.

6 MR. HERBERT: I do recall, your Honor, that when  
7 this lad was tried --

8 THE COURT: He was tried in a criminal case where  
9 they have to prove it beyond a reasonable doubt.

10 MR. HERBERT: He did deny aiming.

11 THE COURT: If you produce him as a witness --

12 MR. HERBERT: It is not up to me to show how the  
13 accident happened, your Honor.

14 THE COURT: I'm merely saying on the evidence  
15 before me all I know is a man was shot.

16 MR. HERBERT: I stipulated he was shot.

17 THE COURT: I say on that evidence it is more  
18 probable than not that the shot was by someone who aimed  
19 at him, based upon human experience. You may disagree with  
20 me and the Court of Appeals may disagree with me.

21 MR. HERBERT: As long as I have my exception pre-  
22 served.

23 THE COURT: You do. What he may have said in the  
24 criminal case is not before me and has no relevance.

25 MR. HERBERT: That is precisely my point, there is

3 no evidence before you as to how it happened.

4 THE COURT: Just that the shot happened. On that  
5 basis I think it is more probable than not that someone aimed  
6 at him.

7 MR. HERBERT: With respect to allowing from 102nd  
8 Street, your Honor, I believe that 102nd Street is at ground  
9 level. That is where the tracks begin to hit ground level.

10 MR. ELKIND: I studied that very carefully the  
11 last couple of days and actually it depends, you know, where  
12 it goes down, it depends which side you look out on.

13 MR. HERBERT: That's correct.

14 MR. ELKIND: There is a difference on the west  
15 side from the east side.

16 MR. HERBERT: That's correct, Mr. Elkind.

17 MR. ELKIND. On 102nd Street you are still above  
18 grade.

19 THE COURT: Your brief says, Mr. Herbert, from  
20 132nd Street defendant's railroad tracks are elevated.

21 MR. HERBERT: To 102nd Street, right.

22 THE COURT: I assume that means including. There  
23 is only one case at 102nd Street and no damage so that is not  
24 very significant one way or another.

25 I am excluding, and you have an exception to my  
excluding, what happened at 138th Street. That is in the

2 Bronx and I don't think it is relevant to this case.

3 Now, what I propose to do is just to advise the  
4 jury that there is a stipulation and that I have admitted in  
5 evidence the stipulation as to incidents of rocks being thrown  
6 at a train over a certain period of time between 102nd  
7 Street and 132nd Street, and there are eight instances of  
8 such.

9 MR. HERBERT: May I get my requests to admit, your  
10 Honor? I didn't know we were going to discuss this  
11 subject so I would like to get them.

12 THE COURT: Yes.

13 (Pause)

14 MR. HERBERT: I have them, your Honor. Can you  
15 indicate to me which ones the Court will rule upon?

16 THE COURT: May 17, 1968, 12:53 P.M. on 125th  
17 Street, one broken window and one person injured; June  
18 10, 1968, 8:05 P.M., 129th Street, no property damage or  
19 personal injury reported; June 11, 1968, 7:05 P.M., 127th  
20 Street, one broken window reported with no personal injury;  
21 June 18, '68, 106th Street, 3:22 P.M. --

22 MR. HERBERT: What was the date, your Honor?

23 THE COURT: June 19, '68, 106th Street, one broken  
24 window, no personal injury reported; September 2, 1968, 5:35  
25 P.M., 130th Street, no property or personal injury reported;

2 September 19, '68, 4:54 P.M., 103rd Street, no damage or  
3 personal injury reported; June 14, '68, 8:53 P.M., 103rd  
4 Street, no damage or injury reported.

5 MR. HERBERT: 103rd Street?

6 THE COURT: 102nd Street, I'm sorry.

7 June 20, '68, 103rd Street -- I'm sorry, January  
8 20, 1969, 2:37 P.M., 103rd Street, no damage reported.

9 MR. HERBERT: I just want to go back to that one  
10 at 106th Street. I dispute the accuracy of that stoning  
11 report on Wednesday, the 19th of June. The way I have it  
12 worded, your Honor, Wednesday, June 19, 1968, 4:45 P.M. --  
13 I'll go off the record for a minute.

14 (Discussion off the record)

15 MR. HERBERT: Apparently there was a mistiming of  
16 that report.

17 THE COURT: There are two reports. You only  
18 disputed the second one.

19 MR. ELKIND: You have agreed to one.

20 MR. HERBERT: Which one? I agreed to the one at  
21 101st or the 106th Street?

22 MR. ELKIND: 106th Street.

23 MR. HERBERT: Yes, I think that is a fair interpre-  
24 tation. That is what I intended to do.

25 THE COURT: So we are okay.

2 I just propose to tell the jury the mechanics of  
3 how this got to be in and read them this list and that is it.

4 MR. HERBERT: I didn't hear the first part of your  
5 comment.

6 THE COURT: I am going to tell them the mechanics  
7 of how we got this evidence before them. He asked for it  
8 and you produced it.

9 MR. HERBERT: I made the admission that those are  
10 our reports. Here again I would call to the Court's atten-  
11 tion and I would ask the Court, and so advise the jury, that  
12 these are just reports. It doesn't mean that the events  
13 happened. It doesn't mean that windows were broken or  
14 persons were injured. It is just that they were reported to  
15 have been stoned.

16 MR. ELKIND: This is knowledge that the railroad  
17 had of reported injuries. I think that is the proper thing.

18 MR. HERBERT: I will also take exception to the  
19 relevancy of this material.

20 THE COURT: You have already done that.

21 MR. HERBERT: Particularly with respect to the  
22 injuries because there is no showing that the persons who  
23 were injured were in the vestibule.

24 I would take exception to using this evidence because  
25 the area we are concerned with is the area of 130th to 125th

3 Street when men go out on platforms to open traps. Now,  
4 men do not go out on platforms to open traps in the areas of  
106th Street.

5 MR. ELKIND: Your Honor, I would agree that no  
6 reference be made to whether or not anyone was injured by  
7 these stonings.

8 THE COURT: I should think you would agree because  
9 it is very much to his advantage to show there were only  
10 three persons injured.

11 MR. ELKIND: So I agree with Mr. Herbert on it.

12 THE COURT: If you want me to take that out, I  
13 will.

14 MR. HERBERT: Take out what, your Honor? My  
15 objection is on --

16 THE COURT: I'm just saying I think you are weakening  
17 your position by objecting to the personal injuries. There  
18 are only three. That is a strong argument for you.

19 I will take it out if you want me to, Mr.  
20 Elkind.

21 MR. HERBERT: Your Honor, I was registering my  
22 objection to the admissibility of this evidence. But the  
23 admissions be as made.

24 THE COURT: Are you objecting to it being admitted,  
25 are you asking me to remove the personal injury reference?

1 rd/lf/9

2                   **91A**

3       If you are, I will do it. I think it is a fool thing for  
you to do.

4                   MR. HERBERT: May I have a moment, your Honor?

5                   THE COURT: Yes.

6                   (Pause)

7                   MR. HERBERT: Yes, I will allow the answers, subject  
8 to my objections made originally, to be read as I have given  
9 them.

10                  THE COURT: All right. In other words, the  
11 personal injuries when indicated will be mentioned.

12                  MR. HERBERT: I didn't hear what the conference  
13 was that you had with his Honor? Is that dealing with your  
14 schedule tomorrow?

15                  THE COURT: We will adjourn today until one o'clock  
16 tomorrow morning, having had lunch.

17                  MR. HERBERT: Having had lunch prior to our resuming  
18 at one o'clock.

19                  THE COURT: Yes.

20                  MR. HERBERT: I think we should put something on the  
21 record. There are two things which I have in mind, Mr.  
22 Elkind. One deals with pecuniary loss. What we would be  
23 required to determine would be an amount that the wife and  
24 dependent children could reasonably have expected to receive  
25 had Mr. Burns continued his life.

1 rd/lf/10

2                   = 92A

3                 In the past I have been able to stipulate with  
4                 counsel that so much money or a certain percentage of money  
5                 would reasonably be expected to have been contributed to the  
6                 family. It would be my desire to arrive at such a stipulation  
7                 with you to avoid the necessity of having to probe and  
8                 question Mrs. Burns about all sorts of expenses and all sorts  
9                 of items that she might not be able to answer.

10                MR. ELKIND: Well, we calculated from her examination  
11                before trial, which you conducted, what the amounts were  
12                that Mr. Burns used for his own personal use and we totaled  
13                those up. I mean things like gasoline for his car and his  
14                union dues and contributions -

15                THE COURT: Why does this have to be on the record?  
16                You can do it off the record.

17                MR. HERBERT: May we have a discussion about that  
18                later on?

19                MR. ELKIND: Surely.

20                MR. HERBERT: One other thing. Are you going to  
21                into the questioning of witnesses this morning as to what  
22                exactly happened with Mr. Burns? That he was shot and  
23                he was hanging on to the edge of the car?

24                MR. ELKIND: I'll tell you, I haven't any eye-  
25                witnesses other than -- I don't know what McGeoch is going  
                  to say and I can't predict what he is going to say in response

3 to any questions I ask.

4 MR. HERBERT: The only thing I have in mind, Mr.  
Elkind, there are youngsters outside --

5 MR. ELKIND: I'm aware of that.

6 MR. HERBERT: Since we don't know what McGeoch  
7 is going to say, I would prefer to have the youngsters  
8 excused.

9 MR. ELKIND: If we get to it.

10 MR. HERBERT: This is just one day for us  
11 and they will have to live with it for the rest of their  
12 lives. I don't want them to hear about that.13 MR. ELKIND: I'm sure I will be sensitive to any-  
14 thing like that.

15 THE COURT: You want to exclude the youngsters?

16 MR. ELKIND: Not unless we get into a point where  
17 I think the testimony is sensitive and at that point I'll  
18 excuse them. I'll see they are taken care of. I feel they  
19 are my wards at least during the trial.

20 (In Open Court)

21 THE COURT: Good morning, ladies and gentlemen,  
22 Before counsel start I will remind you that you heard yesterday  
23 about some discussion of rocks have been thrown at trains.  
24 There have been stipulations as to what happened there and I  
25 am just going to tell you how it came about. What happens,

1 rd/lf/12

2 94A

3 the mechanics is that the plaintiff asked the railroad to  
4 search its records and find out what reports they had of  
5 rocks having been thrown at the trains. The railroad searched  
6 its records and came up with certain reports. I have ruled  
that some of them can be admitted.

7 Now, I will go into more detail when I come to the  
8 charge as to the theory of what relevance it has in this  
9 case, but in general it is for you to determine whether this  
10 evidence or these incidents should have, under the rules  
11 that I will lay down in more detail for you, affected the  
12 railroad's method of doing business and conducting itself in  
13 the particular context of plaintiff's duties in opening and  
14 shutting car doors. I will go into that later. That is, just  
15 in general what it is relevant to and when I come to my  
16 charge, why I will try to explain it to you in clear  
17 language how you are supposed to consider it.

18 Let me tell you now, again, naturally when I lay  
19 down rules to you I have to say to assume these facts and  
20 assume those facts, and such and such a rule you can  
21 make this deduction from and such and such a rule you can  
22 make that deduction from. Believe me, I will do it as best  
23 I can in a neutral fashion so as not to suggest what I think  
24 the result should be. But by the time you hear me probably  
25 you will have made tentative conclusions in your own mind what

1 rd/lf/13

25A

2 the results will be and the human tendency is to listen to  
3 what I say as confirming what you have -- the way I put it  
4 as confirming what you have already concluded. But please do  
5 me the favor of listening to what I say for the purpose of  
6 getting the rules I lay down and try not, in the way I  
7 express them, conclude that I have a feeling one way or  
8 another how you should apply those rules, because that is  
9 not my function.

10 Now, I have ruled that you may consider these  
11 incidents or that such incidents occurred within the time  
12 frame we are dealing with here between 102nd Street and 132nd  
13 Street.

14 Now, 102nd Street is where it comes out of the  
15 tunnel and becomes elevated. 132nd Street is where it leaves  
16 Manhattan Island. So I have concluded that you can consider  
17 instances of rocks being thrown during that period under  
18 the rules I will lay down.

19 Now, it happens that between May 17, 1968, and  
20 June 20th -- January 20, 1969, apparently the last record  
21 they have, eight instances were reported to the railroad of  
22 a rock having been thrown at a train.

23 Now, the first of those is on May 17, 1968, at  
24 12:53 P.M. at 125th Street. According to the railroad's  
25 records, somebody threw a rock at the train, broke a window

1 rd/1f/14

2 96A

3 and one person was injured; on June 10, 1968, 5:00 P.M., 129th  
4 Street, a rock was thrown at a train and no injury was re-  
5 ported, a window was broken and nothing was hurt as far as  
6 the report shows; on June 11, '68, at 7:05 P.M., 127th  
7 Street, a rock was thrown at a train and a window was  
8 broken and nobody was hurt as far as the report shows.  
9 On June 19, 1968, at 3:22 P.M. at 106th Street a rock was  
10 thrown at a train and a window was broken and no report of  
11 injury; on September 2, 1968, at 130th Street at 5:35 P.M.  
12 a rock was thrown at a train and no damage was reported, to  
13 either person or property; on September 19, 1968, at 4:54  
14 P.M. at 103rd Street a rock was thrown at a train and no  
15 damage was reported; on October 14, 1968, at 8:53 P.M. at  
16 102nd Street a rock was thrown at a train and no damage was  
17 reported; on January 20, 1968, at 103rd Street at 2:37 P.M.  
18 a rock was thrown at a train and no damage was reported.

19 Now, both counsel will argue when their respective  
20 turns come as to what inferences you should or should not  
21 draw from these facts. After you have heard those arguments  
22 I will tell you what the law is.

23 Now, we had a witness on the stand.

24 MR. ELKIND: Yes, Mr. McGeoch is on the stand.

25 P E T E R J. M C G E O C H , resumed.

DIRECT EXAMINATION CONTINUED

1 rd/1f/15                    McGeoch-Direct

2 BY MR. ELKIND:

3            Q    Now, Mr. McGeoch, with reference to the stipulation  
4    on stonings that his Honor just read to the jury, were you  
5    able to hear the dates and the places?

6            A    I think one was January or September.

7            Q    Let me run through them again. They were May 17th --

8            THE COURT: You can have that list and put it  
9    in front of you.

10          Q    If you want to look at it, it will shorten the  
11   problem.

12          A    All right.

13                 (Reading)

14          A    Yes, they are all 1968.

15          Q    Except the one on January 20, 1969, the last one,  
16   which is January 20, 1969.

17          A    I'm sorry, I didn't see it.

18                 Yes, I've seen it.

19          Q    Now, on March 15, 1969, when you were the conductor  
20   of the train, did you have any knowledge or had anyone ever  
21   told you about these stonings?

22          A    Knowledge?

23          Q    Did you know anything about them?

24          A    These?

25          Q    Yes.

1 rd/1f/16

McGeoch-Direct

2 A I couldn't say if I ever heard it. But no one  
3 ever specifically told me.

4 THE COURT: Well, now, obviously you wouldn't have  
5 known about these particular dates and times but did you  
6 know there had been stonings?

7 THE WITNESS: In that area, I don't believe so.  
8 In that area I don't honestly believe so.

9 Q As a matter of fact when I examined you before  
10 trial you only knew of some stonings up around Spuyten Duyvil.

11 A And Glenwood. Glenwood.

12 Q Nobody had ever told you or you knew nothing  
13 about any stonings in the Harlem area which has been described,  
14 isn't that correct?

15 A I think once right at the end of the tunnel  
16 a kid threw a bottle at the front of the train but it didn't --  
17 and I believe once a guy told me he saw the kid flip the  
18 bottle like this and the train went by. He didn't do anything,  
19 but that would be to my knowledge. That was just as they  
20 were going into the tunnel.

21 Q Now, yesterday evening or afternoon when we  
22 suspended I was asking you if you could describe to the jury  
23 where you were in the first car as the train approached  
24 125th Street, do you remember that? Do you remember what  
25 happened yesterday afternoon?

1 rd/lf/17

McGeoch-Direct

2 A I think I was -- I believe I was between one-third  
3 and halfway in the middle of the car from the tail end.  
4 That would be about the best of my knowledge, in that area.

5 Q Between one-third and a half?

6 A Well, one-third to the half of the car, like in  
7 between that area.

8 Q In the back half -- were you in the back half then?

9 A I believe so. Yes, in the back half.

10 Q Were you standing in the car?

11 A Yes.

12 Q And was it while you were in that position that you  
13 saw Mr. Burns go to the rear of the lead car?

14 A No. I saw Mr. Burns when I was there come out of  
15 the front end of the head car.

16 THE COURT: Well, he passed you, right?

17 THE WITNESS: Yes.

18 Q Did he pass you?

19 A Yes, George went by me.

20 Q And did he say anything as he passed you?

21 A I really don't recall.

22 Q Well, that is an answer. Did you say anything  
23 to him?

24 A I really couldn't swear to it one way or another.

25 Q Did he say anything to the passengers? Did he

1 rd/lf/18

McGeoch-Direct

2 announce the station?

3 A Yes, when he was coming down on 125th Street. I  
4 think he said that more or less as soon as he was coming --

5 Q When he was coming down he said 125th Street?

6 A Or 125th Street next. I know he announced the  
7 station but I don't know if it was exactly then, you know.8 Q All right. Now, at that time can you give us some  
9 information as to whether or not the train was still on  
10 the 138th Street bridge?11 A To the best of my knowledge we were south of  
12 138th. I would say about 133rd or 134th Street, in that  
13 area.14 THE COURT: When Mr. Burns passed you going to the  
15 back of the car?16 THE WITNESS: Yes. It seems to me we were on  
17 the straight part of the track when this happened and that  
18 would be around that bend.19 Q Now, there is a bend in that 138th Street bridge,  
20 is there not?

21 A Excuse me?

22 Q Isn't there a bend in the 138th Street bridge?

23 A The bridge is straight but when you come off it  
24 coming to Manhattan there is a bend.

25 Q All right. Now, can you recollect, and I know

1 rd/1f/19

McGeoch-Direct

2 this is difficult and maybe it is a little unfair but  
3 you are the only one I can call on for whatever information  
4 you have --

5 A I am trying my best.

6 Q All right, sir. Do you recall whether or not when  
7 you came to that bend, after you get off the bridge, whether  
8 or not Mr. Burns had gone to the platform? Had he reached  
9 the platform at that time?

10 A When we were on that bend?

11 Q Yes.

12 A I don't think George had left the cab then. I  
13 think he was still on the front. To the best of my know-  
14 ledge it was after we were on the straight when George come  
15 back.

16 Q You believe it was after you were on the straight?

17 THE COURT: He was up chatting with the engine man?

18 THE WITNESS: He was up chatting with the engine  
19 man. I believe it was when we were on the straight that he  
20 came back.

21 Q Are you just guessing or is this a recollection  
22 that you have? That's important. Are you just guessing,  
23 because if it is let me know.

24 MR. HERBERT: I can't see the relevancy here.

25 THE COURT: Neither do I but maybe he does.

2 MR. HERBERT: I know he is trying to test Mr.  
3 McGeoch's memory.

4 THE COURT: I will allow the question.

5 THE WITNESS: I'm trying to really think about  
6 George coming back, and it seemed to me we were on the  
7 straight. It just seems that way now. I wouldn't swear to  
8 it but the best of my knowledge we were on like the straight.

9 Q No one ever asked you that question until today  
10 in this courtroom, is that right?

11 A I do not believe so.

12 Q Now, the train I guess was going how fast? You  
13 tell me, at that time after you came off the 138th Street  
14 bridge.

15 A After we come off the 138th Street bridge we were  
16 going progressively slower because I believe there was a  
17 train that had proceeded down that same track in front of us,  
18 and we were slowing. We were like slowing down on account  
19 of him down further. And we weren't going fast.

20 Q Would you say you were going three miles an hour,  
21 is that about right?

22 A You said after 138th Street bridge now. You are  
23 talking right after. I would say we --

24 Q From 138th Street until Mr. Burns was shot, were  
25 you proceeding at about three miles an hour?

1 rd/1f/21

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2 A Not every part of that. We were slowing down, you  
3 know.

4 Q I see.

5 A We weren't doing three miles an hour as soon as we  
6 come off the bridge but we were slowing down. Then when we  
7 got down to where George was shot, that's about what we were  
8 doing. In fact, I believe we stopped, proceeded, you know.  
9 That is because of the train in front of us.

10 THE COURT: Refresh my recollection. How far out-  
11 side the station did the accident occur?

12 MR. ELKIND: The accident occurred -- he was shot  
13 between 126th Street and 129th Street.

14 THE COURT: Where does the station extend to?

15 MR. ELKIND: A little past 126th Street.

16 MR. HERBERT: Midway between 126th Street and 127th.

17 THE COURT: So it was about two and a half blocks  
18 before the beginning of the platform, is that right?

19 THE WITNESS: A block and a half.

20 MR. HERBERT: Is it a block and a half or two and  
21 a half? I'm not too good in math.

22 THE COURT: A block and a half.

23 MR. HERBERT: About a block and a half, two blocks.

24 THE COURT: All right.

25 Q Now, you and Mr. McGeoch were each wearing uniforms?

1 rd/lf/22

McGeoch-Direct

2 MR. HERBERT: Mr. Burns?

3 MR. ELKIND: Mr. Burns.

4 A Yes.

5 Q That is a blue uniform?

6 A Yes.

7 Q And you were wearing hats?

8 A Yes.

9 Q Is that a military type of hat with a visor?

10 A Yes.

11 Q And you had buttons, brass buttons on the uniform?

12 A Are there?

13 Q Do the uniforms have brass buttons?

14 A Yes.

15 Q Now, I show you a photograph, and I will ask  
16 the reporter to mark this Plaintiff's Exhibit 2 for identi-  
17 fication.

xxx

18 (Plaintiff's Exhibit 2 marked for identification.)

19 THE COURT: Any objection to it being admitted in  
20 evidence?

21 MR. HERBERT: No. Whatever Mr. Elkind and I can  
22 agree upon we will put in evidence. Mr. Elkind just told me  
23 these were obtained --

24 MR. ELKIND: These are the police photographs.

25 THE COURT: Let's mark it in evidence.

1 rd/1f/23

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2 MR. HERBERT: We can mark them and introduce them  
3 in evidence.

4 MR. ELKIND: Plaintiff's Exhibit 2 in evidence is a  
5 photograph of car 1166 and car 1147, which I think counsel  
6 will stipulate were the two cars in the train involved in  
7 this accident.

8 THE COURT: Which was front and which was back?

9 MR. ELKIND: The car in front is 1147.

10 MR. HERBERT: That's correct, your Honor. I  
11 stipulate to that.

12 MR. ELKIND: So I won't be questioning the  
13 witness, Mr. Herbert, will you agree that the photograph  
14 shows the door open on 1147 and closed on 1166?

15 MR. HERBERT: Correct.

16 MR. ELKIND: All right.

17 (Plaintiff's Exhibit 2 received in evidence.)

18 MR. HERBERT: I think that would be the west side?

19 MR. ELKIND: That is the west side.

20 MR. HERBERT: We will stipulate those photographs  
21 were taken from the west side of the car.

22 MR. ELKIND: Mark this as Plaintiff's Exhibit 3.

23 (Plaintiff's Exhibit 3 marked for identification.)

24 (Pause)

25 MR. ELKIND: May the record show that counsel have

1 rd/1f/24

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2 stipulated that Plaintiff's Exhibit 3 is a close-up view  
3 of the rear vestibule of car 1147.

4 THE COURT: Is that the one that was opened?

5 MR. ELKIND: The one that was opened.

6 THE COURT: In other words, the front car was the  
7 one that was opened?

8 MR. ELKIND: Yes, sir.

9 MR. HERBERT: The photograph I think was taken from  
10 the west side, Mr. Elkind, is that right?

11 MR. ELKIND: I would say from the west side. So  
12 stipulated.

13 BY MR. ELKIND:

14 Q Now, Mr. McGeoch -- mark this in evidence.

15 MR. HERBERT: No objection.

xxx 16 (Plaintiff's Exhibit 3 received in evidence.)

17 Q I show you Plaintiff's Exhibit 3, which Mr. Herbert  
18 and I have stipulated is a picture of the M.U. car, 1147,  
19 with a view from the west side.

20 A Yes.

21 Q Now, Plaintiff's Exhibit 3 shows the car with  
22 the trap door open, does it not?

23 A Yes.

24 Q And with the door leading to the outside also open?

25 A Yes.

1 rd/lf/25

2 McGeoch-Direct

3 Q Now, is the arrangement on the east side of the  
4 train exactly the same as the arrangement on the west side,  
5 that is, what I am trying to ask you is there also a door and  
a trap door on the east side?

6 A Yes.

7 MR. HERBERT: Of that same car at that same end?

8 MR. ELKIND: Yes.

9 Q Is the arrangement for the door being in the closed  
10 position and the trap in the closed position on the east side  
11 also shown in Plaintiff's Exhibit 3? Do you understand my  
12 question?

13 THE COURT: I take it the answer is yes to that  
14 question.

15 MR. ELKIND: It should be.

16 MR. HERBERT: I will stipulate that. The photograph  
17 shows the door closed with the trap down.

18 Q Now when you as a trainman prepare the car or pre-  
19 pare this door for entrance by passengers or for passengers  
20 to get off and use it --

21 A This one or any one?

22 Q On this equipment.

23 A Yes.

24 Q Will you tell the jury step by step what you have  
25 to do.

1 rd/1f/26

McGeoch-Direct

2 A When we get on the train at a terminal we walk  
3 through it, put up the lights --

4 Q I'm sorry, Mr. McGeoch. You don't understand my  
5 question.

6 THE COURT: Neither do I.

7 MR. ELKIND: I'm sure the sin is mine, your Honor,  
8 and let me try to exculpate myself.

9 Q All I'm asking about is the opening up of the  
10 doors. I want you to tell the jury whether you open the  
11 door first or you open the trap door first, that's all I'm  
12 getting at.

13 A You must open the door first.

14 THE COURT: The trap door can't come up until the  
15 door is opened.

16 A Lift up the trap. When the trap is up it locks  
17 on the outside of the door. This is how it is made. There  
18 is a catch there. (Indicating) That's the door, see?

19 Q So in this picture that we see here, Plaintiff's  
20 Exhibit 3, there is a handle that is shown.

21 A That is the inside of the outside door.

22 Q You want to draw an arrow to the handle, please.  
23 Just draw an arrow.

24 (Witness Complies)

25 Q Put an H behind it.

1 rd/1f/27

McGeoch-Direct

2 (Witness Complies)

3 MR. HERBERT: H standing for handle, Mr. Elkind?

4 MR. ELKIND: H standing for handle.

5 Q All you have to do is to turn that handle that you  
6 have marked H down, right? You turn it down?

7 A You lift it up.

8 Q All right, you lift it up.

9 A Yes, and swing the door.

10 Q And then you swing the door and then it goes back  
11 against a catch? Wait, one step at a time. Back against a  
12 catch?

13 A Yes.

14 Q Now, you reach down and there is a place for your  
15 hand to handle the trap, is that right?

16 A Yes.

17 Q And what do you call that place where you put your  
18 hand to lift the trap? What is that called?

19 A By name?

20 Q Yes.

21 A A latch, that's all.

22 Q Okay, latch. You draw an arrow to the latch and  
23 mark that with an L.

24 (Witness Complies)

25 Q And mark that with an L.

1 rd/lf/28

McGeoch-Direct

2 A All right.

3 Q So then all you have to do to open the trap door  
4 is to lift that latch and it then goes right against the  
5 door and holds, there is a catch that holds it.

6 A Swing the whole trap up and it catches on the door.

7 Q Now, that procedure of opening -- turning the  
8 handle, opening the door, bending down, lifting the trap and  
9 lifting it up, how long does that take in time? Ten seconds?

10 A Less.

11 Q Less than ten seconds?

12 A Yes.

13 THE COURT: Have you ever timed yourself doing  
14 it?

15 THE WITNESS: It is just -- (indicating).

16 Q It is almost as fast as you can say it, is that  
17 right?

18 A Yes.

19 MR. HERBERT: Objection, your Honor. Obviously  
20 that couldn't be true.

21 THE COURT: It wouldn't appear to be true.

22 MR. HERBERT: Of course we are presupposing that  
23 the doors are functioning properly, your Honor.

24 THE COURT: No evidence to the contrary.

25 MR. ELKIND: I move to strike counsel's comment.

1 rd/1f/29                    McGeoch-Direct

2                            THE COURT: No evidence the door was not functioning  
3 properly.

4                            MR. HERBERT: I agree.

5                            MR. ELKIND: I would like to get these photos in  
6 some reasonable order.

7                            (Pause)

8                            MR. ELKIND: Would the reporter please mark  
9 this photograph as Plaintiff's Exhibit 4 for identification.

10                          THE COURT: Mark it in evidence.

xxx 11                          (Plaintiff's Exhibit 4 received in evidence.)

12                          MR. ELKIND: May I have permission to pass Plain-  
13 tiff's Exhibit 3 to the jury?

14                          MR. HERBERT: May I first see the markings, your  
15 Honor?

16                          THE COURT: Yes.

17                          MR. ELKIND: Your Honor, Plaintiff's Exhibit 4 is  
18 a photograph of the Penn Central tracks over Park Avenue  
19 with the camera facing north from a position south of 129th  
20 Street. In other words, the camera is between 129th and  
21 128th and this is the view looking north.

22                          May I have permission to pass Plaintiff's Exhibit  
23 4 to the jury?

24                          THE COURT: Certainly.

25                          MR. ELKIND: Mark this as Plaintiff's Exhibit 5 in

1 rd/1f/30

2 evidence.

xxx 3 (Plaintiff's Exhibit 5 received in evidence.)

4 MR. ELKIND: Plaintiff's Exhibit 5 is a photograph  
5 taken from 125th Street station, that is, the north end of  
6 125th Street station with the camera facing north.7 MR. HERBERT: I believe it indicates the photograph  
8 was taken on the north end of the platform between tracks  
9 one and three.10 THE COURT: Is there any material difference  
11 between the last two?12 MR. HERBERT: No. I just want to make sure we  
13 have clearly the track numbers, you see. It shows a portion  
14 of the platform between tracks two and four and the track  
15 going north.

16 THE COURT: I see.

17 (Pause)

18 THE COURT: How many more of these pictures are  
19 you going to have?20 MR. ELKIND: I think this is probably the last one,  
21 your Honor. Mark this.

xxx 22 (Plaintiff's Exhibit 6 marked in evidence.)

23 MR. ELKIND: Plaintiff's Exhibit 6 in evidence is a  
24 photograph looking south toward 125th Street station with the  
25 camera between 128th Street and 129th Street. I will pass it

1 rd/lf/31                    McGeoch-Direct

2 to the jury.

3                    MR. HERBERT: Pointing south between tracks two  
4 and four, I believe, is that right, Mr. Elkind?

5                    MR. ELKIND: If you say so. I don't know the  
6 numbers of those tracks. I have never been able to follow  
7 them.

8 BY MR. ELKIND:

9                    Q Now, Mr. McGeoch, one other piece of information  
10 about the car -- the cars that were involved in this train.  
11 How do you get from the interior of the car where the  
12 passengers sit out to the vestibule?

13                    A There is a sliding door.

14                    Q Now, as the train continued to slow down and as it  
15 was approaching, say, 129th Street, did you move from the  
16 position that you had previously described to us, which you  
17 said was between one-half and one-third of the way down the  
18 car from the rear end? Did you move?

19                    A I couldn't swear to it, but my common sense  
20 tells me I wouldn't be standing, just standing.

21                    THE COURT: You were picking up tickets?

22                    THE WITNESS: Yes. At that point was I standing?

23                    THE COURT: Wouldn't it be natural to assume you  
24 were walking down as you were picking up tickets?

25                    THE WITNESS: Yes, picking up those hat checks.

1 rd/lf/32

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2 I couldn't swear to it.

3 Q Well, did there come a time before the train  
4 reached 129th Street when you were standing at the rear end  
5 of the car?

6 A Yes.

7 Q Near the sliding door?

8 A Yes. I think I was leaning against the water  
9 fountain.

10 Q Beg your pardon?

11 A I believe I was just leaning against the water  
12 fountain.

13 Q Against it?

14 A The water fountain. I think I was standing there.

15 Q Which is just inside the car?

16 A Yes.

17 Q And that was about 129th Street, wasn't it, or  
18 before that?

19 A I don't know when I started to stand there.

20 Q Well, in any event weren't you in that position and  
21 didn't you see Mr. Burns go back into the rear car and then  
22 make an announcement in the rear car that you were coming to  
23 125th Street?24 A I don't believe I was standing there. The best of  
25 my recollection, when George came out of the front I was at

1 rd/lf/33

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2 like the end. Then I knew he was coming back for the station.  
3 Then I started to pick up the checks. And then you asked me  
4 before about how far up in the car was I when George passed  
5 me.

6 Q Yes.

7 A So between like one-third to halfway when George  
8 went by me.

9 THE COURT: I don't want to restrict you but I  
10 wish you would tell me what possible relevance all this has.

11 MR. ELKIND: I am trying to establish where he was  
12 when the events took place.

13 THE COURT: What difference does it make?

14 MR. ELKIND: Well, I haven't asked him what he saw  
15 yet, your Honor.

16 THE COURT: But what difference does it make what  
17 he saw? It is conceded that the man was standing on the  
18 steps, right?

19 MR. HERBERT: That's correct. There is no dispute  
20 where Mr. Burns was at the time of the unfortunate accident.

21 THE COURT: And he was shot while standing there,  
22 and the issue is was the railroad negligent in letting him  
23 stand there. What difference does it make where he was  
24 standing.

25 MR. ELKIND: I think it may help the jury in

1 rd/lf/34

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2 determining at what point in the trip and what point geo-  
3 graphically he got down to that bottom step, which I con-  
4 sider to be of some significance. Perhaps the jury might  
5 not.

6 THE COURT: Why don't you ask him if he knows at  
7 what point he got down the bottom step.

8 Down where?

9 THE WITNESS: Exactly?

10 THE COURT: Of course you don't know exactly but  
11 as near as you can judge where the train was when he got  
12 down on the bottom step.

13 THE WITNESS: About three blocks away from the end  
14 of the station, I guess. Now, this is estimate. About the  
15 time he opened the door and yelled 125th Street to the time  
16 he opened the trap.

17 THE COURT: Your best estimate is he got down on  
18 the steps about three blocks before the station?

19 THE WITNESS: That would be my honest, as close  
20 as I could possibly testify.

21 Q And did you see him on that step?

22 A Yes, I did.

23 Q Where were you at that time?

24 A When I saw George on the step I was halfway -- when  
25 I first saw him I was halfway inside the car and on the platform,

1 rd/lf/35

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2 the platform. That is when I first saw him.

3 Q Now, the question is when did you see him on the  
4 step?

5 MR. HERBERT: That is what he just answered, Mr.  
6 Elkind.

7 THE COURT: That is what he is trying to tell you.

8 Q You saw him on the step from halfway in the car?

9 A Excuse me?

10 THE COURT: You were stepping out onto the platform,  
11 is that what you say?

12 THE WITNESS: Yes. My vision would be as soon as  
13 I saw him, you know, I would be stepping out of the main  
14 part of the car onto the platform. That would be my first  
15 vision.

16 MR. ELKIND: I'm sorry, I didn't hear that.

17 THE COURT: The witness said he was stepping out  
18 from the main car onto the platform and saw Mr. Burns on  
19 the step. That is what the witness said.

20 MR. HERBERT: The platform meaning the vestibule  
21 platform.

22 THE WITNESS: Yes.

23 THE COURT: You weren't getting down on the  
24 step?

25 THE WITNESS: No.

2 Q You were in the vestibule then?

3 THE COURT: Stepping out.

4 MR. HERBERT: Objection, your Honor. He has already  
5 told us where he was. Mr. Elkind is trying to argue and  
6 confuse him.

7 Q Did you at any time go out to the vestibule?

8 THE COURT: He said he was stepping out onto it  
9 when he saw Mr. Burns on the step.

10 Q So that means there came a time when you were on  
11 the vestibule?

12 A Yes, I was on the vestibule.

13 Q Did you go out onto the vestibule before or after  
14 you heard a shot or a crack?

15 A After.

16 Q Okay. Where were you when you heard the shot?

17 A I would say it seems to me --

18 THE COURT: Counsel, come to the side bar.

19 (At the side bar)

20 THE COURT: If I were a teenage kid I wouldn't want  
21 to hear about my father being shot, where he was shot, when  
22 he was shot, why he was shot.

23 MR. ELKIND: I'll excuse them at the appropriate  
24 time.

25 THE COURT: The appropriate time is right now.

1 rd/1f/37

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2 MR. ELKIND: Nothing has happened yet.

3 THE COURT: I don't know what you think is happening  
4 but if my father was shot I would think talking about when  
5 they heard the shot, where he was shot, I would find that very  
6 disagreeable.

7 MR. HERBERT: Your Honor, this is exactly what I  
8 brought up in chambers.

9 THE COURT: I think they should be asked to leave.  
10 I find it embarrassing to sit here and watch them.

11 MR. HERBERT: I'm going to move for a mistrial.

12 MR. ELKIND: Oh, come on.

13 THE COURT: Don't say "come on."

14 MR. ELKIND: Your Honor, I was talking about his  
15 remarks. I was not being disrespectful to your Honor. I'm  
16 surprised where you have such an idea that I would be dis-  
17 respectful. I have the highest regard for you.

18 MR. HERBERT: Mr. Elkind assured us he was going  
19 to dismiss them at the appropriate time and he has not done  
20 so.

21 (In Open Court)

22 THE COURT: Why don't we take a short recess. We  
23 all need to stretch our legs.

24 (Recess)

25 A VOICE: Aren't the plaintiffs supposed to be

1 rd/lf/38

McGeoch-Direct

2 present?

3 THE COURT: You are not supposed to comment.

4 Who are you?

5 A VOICE: I am a U. S. citizen, resident of  
6 Brooklyn and Palm Beach.

7 THE COURT: Please be quiet.

8 BY MR. ELKIND:

9 Q Mr. McGeoch, this was about seven clock on March  
10 15th, right, the event we are talking about happened?

11 A Yes.

12 Q Am I correct that the trains were lit, you had  
13 lights on the train?

14 A Yes.

15 Q And there is a light on in the vestibule?

16 A Yes.

17 Q Were the street lights on in the area?

18 A I believe so.

19 Q Now, when you heard the shot --

20 A When I heard the crack, yes, sir.

21 Q Or the crack, you stepped out into the vestibule,  
22 is that right?

23 A Yes, sir.

24 Q All right. Were there people in the vestibule?

25 A There was a man and there was a woman in the other

1 rd/lf/39

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2 car. There was a man and there was a woman in the  
3 head end of the rear car.

4 THE COURT: That is the same man and woman?

5 You were mentioning two men and two women, were you?

6 THE WITNESS: No. There was a man, and there  
7 was a woman like in the head end of that second car.

8 THE COURT: In the vestibule?

9 THE WITNESS: In the vestibule of that second  
10 car.

11 THE COURT: What about the first car, the one  
12 you were in?

13 THE WITNESS: There was a man there. He had a hold  
14 of the grab iron, which is that thing going down, and he was  
15 reaching for George. His foot was like this (indicating)  
16 when I came here.

17 Q Do you know that man's name?

18 A I have heard it since. I'm sure I heard it then,  
19 and it was Swaboda or something. It is in that area.

20 THE COURT: I take it the police took his name?

21 THE WITNESS: I believe so.

22 Q What did you do at that point?

23 A The man was near George, at that point when I saw  
24 him he was swinging around, I presume, trying to get back  
25 in. Presumption. He was swinging around, grabbing and

2 went back (indicating). That is how George went off the  
3 train. His knees buckled and he just -- (indicating)

4 Q Was the train moving at the time that you heard  
5 this shot?

6 A Yes.

7 Q And did it continue to move?

8 A Yes.

9 Q And at what rate of speed was it traveling at that  
10 time?

11 A Three miles an hour.

12 Q And how long a period of time was it between the  
13 time that you heard the shot and the time that you saw Mr.  
14 Burns, as you described him, fall off of the train?

15 A From the time I heard his shot until George fell  
16 off?

17 Q Yes.

18 A I would say -- I would estimate to the best of  
19 my ability six seconds or seven seconds.

20 Q Six or seven seconds.

21 A It was fast.

22 Q So that during that six or seven seconds that you  
23 saw him already with his back to the tracks, back to the  
24 open door?

25 A He was like -- when I first saw George he was like

1 rd/lf/41

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2 swinging.

3 Q How long after you heard the crack was it that you  
4 saw him swinging?

5 THE COURT: What is the relevance of that?

6 MR. ELKIND: I think it is relevant. To establish  
7 where.

8 MR. HERBERT: I think it is --

9 THE COURT: Please, I'm questioning counsel.

10 MR. ELKIND: My purpose, your Honor, in this  
11 line of questioning is to establish when Mr. Burns first  
12 placed himself on the lower step of car 1147.

13 THE COURT: How does this establish it?

14 MR. ELKIND: We know he fell between 128th and  
15 129th Street, but that doesn't establish the place  
16 where he was shot. Obviously he was shot further north of  
17 that. I'm trying to give the jury a basis to make an esti-  
18 mate.

19 THE COURT: He was shot eight seconds farther  
20 north. You don't have to go over this thing again and  
21 again.

22 Q Now, you saw George actually fall off and down  
23 into the six footer, right?

24 A Yes.

25 Q And then what did you do?

1 rd/lf/42

McGeoch-Direct

2 A Reached up and gave Brown the signal to stop the  
3 train.

4 THE COURT: Emergency stop?

5 THE WITNESS: Yes. I give him two on the buzzer.

6 Q And the buzzer is right in the vestibule, is that  
7 correct?

8 A Yes. There is one in the vestibule and there  
9 is one just inside that sliding door, both.

10 Q Which one did you use, that is all I'm interested  
11 in.

12 A I believe it was the one just inside the door.

13 Q Inside the door?

14 A Yes, just inside that sliding door, just inside.

15 Q Then you went back in from the vestibule to  
16 inside the door or you reached inside the door?

17 A Yes, reached.

18 Q From the vestibule?

19 A Yes.

20 Q And did you then get off of the train?

21 A Yes.

22 Q And did you see -- did you go to Mr. Burns first  
23 or did you go to the station?

24 A I didn't go to Mr. Burns first. I looked at Mr.  
25 Burns and then I ran up to 125th Street station and get the

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2 doctor. I thought of a doctor right away.

3 MR. ELKIND: I have no further questions.

4 THE COURT: One thing is not clear to me. You  
5 said that when you heard the shot or the crack, as you  
6 call it --

7 THE WITNESS: Crack, sharp crack.

8 THE COURT: You were stepping out into the vestibule?

9 THE WITNESS: I was in the car. When I heard that  
10 crack, it sounded loud and I ran back and I saw George then,  
11 you know, and he was just swinging around (indicating).

12 THE COURT: Had you seen him on the step before  
13 that or is that the first time you saw him on the step?

14 THE WITNESS: That is the first time I saw him  
15 on the bottom step.

16 THE COURT: You saw him go down onto the step be-  
17 fore that?

18 THE WITNESS: No, I didn't see him go into the  
19 stepwell before that time, no.

20 THE COURT: I see. That is what I was confused about.  
21 So you didn't see him go on the step before, you only heard  
22 him after you heard the crack?

23 THE WITNESS: Yes.

24 THE COURT: Before that all you saw him do was call  
25 the station and go out into the vestibule?

2 THE WITNESS: Yes.

3 MR. ELKIND: One other question.

4 BY MR. ELKIND:

5 Q Mr. McGeoch, was that a normal position for Mr.  
6 Brown to have been in under those circumstances --

7 A Mr. Brown? He was the engineer.

8 Q For Mr. Burns to be in at that time and place,  
9 that is, on the bottom step of the open trap door?

10 A I would have to say it wouldn't be abnormal.

11 Q Is that the position you usually take, and if so  
12 for what purpose?13 A If you were there it would just mean that nobody  
14 could get off the train ahead of you.

15 THE COURT: What did you say?

16 THE WITNESS: It would be that nobody got off the  
17 train ahead of you before you stopped.18 Q It is to protect the passengers from getting off  
19 the moving train, isn't that the reason the man takes that  
20 position?

21 A Yes.

22 THE COURT: So you are the first one off the  
23 train, no passengers ahead of you?

24 THE WITNESS: Yes.

25 MR. ELKIND: That is all.

1 rd/lf/44a

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2 MR. HERBERT: I have no questions, your Honor.

3 THE COURT: You may step down.

4 (Witness Excused)

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(In the Robing Room)

3 MR. ELKIND: Your Honor, there are a few questions  
4 on liability that I think we can cover by stipulation, if  
5 they are not already in the record. I don't think there is  
6 any dispute about them.

7 One is that the decedent's time before this acci-  
8 dent, according to the defendant's records -- that is his  
9 working time -- was spent about one-third in passenger ser-  
10 vice and two-thirds in freight service, according to your  
11 records, is that right?

12 MR. HERBERT: For the purposes of this trial I  
13 so stipulate. There are those records I have to admit, Mr.  
14 Elkind, they are not complete. The passage of years has  
15 not allowed me to get the complete records. The records I  
16 have indicate that one-third was spent in passenger service  
17 and two-thirds in freight service.

18 MR. ELKIND: That is okay. The second stipulation  
19 is that the coroner's report indicated the man was shot  
20 through the heart.

21 You don't want me to read the coroner's record  
22 to the jury, do you?

23 MR. HERBERT: Of course not, Mr. Elkind. I'm  
24 wondering why is it necessary to indicate such?

25 MR. ELKIND: We will have the children and wife out.

2 THE COURT: What is the relevance of it except to  
3 cut down the pain and suffering?

4 MR. HERBERT: As a matter of fact, your Honor,  
5 the second cause of action in this lawsuit -- I think it is  
6 the second cause of action -- is an action for pain and  
7 suffering and I would move to dismiss that claim on the  
8 basis of the stipulation which has already been read into  
9 evidence that the decedent was instantly killed.

10 THE COURT: According to the evidence "instant"  
11 means for several seconds. I suppose he may have suffered  
12 for several seconds.

13 MR. ELKIND: I don't know that we stipulated he  
14 was instantly killed.

15 MR. HERBERT: I would suggest that you read stipu-  
16 lation number eight.

17 THE COURT: That is my recollection.

18 MR. HERBERT: Which you read to the jury in which  
19 you said he was intantly killed.

20 MR. ELKIND: If it is in there I am bound by it.

21 MR. HERBERT: I want to move to dismiss the claim  
22 with regard to conscious pain and suffering.

23 THE COURT: It might be to your advantage to  
24 dismiss it because it seems to me is so minimal. When I was a  
25 lawyer I always hated anything to go to the jury that I

2 thought they would decide against me. I thought that was  
3 bad psychology.

4 MR. ELKIND: I would be willing to withdraw the  
5 cause of action for conscious pain and suffering.

6 THE COURT: All right. How does it have any  
7 relevance as to how he was killed, whether the bullet  
8 went through the heart or anything else?

9 MR. ELKIND: Probably not.

10 THE COURT: The fact that he was instantly killed  
11 is about all you need.

12 MR. ELKIND: All right.

13 MR. HERBERT: The "all right" being that you with-  
14 draw your claim for conscious pain and suffering?

15 MR. ELKIND: I already did that. Now I'm also  
16 concurring in the judge's observation that it is not necessary  
17 to establish he was shot through the heart. I don't think  
18 that matters.

19 The only thing it might matter on is perhaps we  
20 ought to have it on the record even though it doesn't go  
21 to the jury, and that is in connection with the presumption  
22 that he was intentionally killed.

23 THE COURT: It is on the record.

24 MR. HERBERT: Am I in error, your Honor? I believe  
25 you did rule already in this lawsuit, and I know I have taken

1 rd/lf/4

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2 exception to it, that it was intended -- that the assailant  
3 intended to shoot Mr. Burns.

4 THE COURT: I ruled it is more probable than not  
5 that the assailant intended to shoot not Mr. Burns but the  
6 man who was on the platform.

7 What Mr. Elkind wants is the Court of Appeals to  
8 know that it went through his heart in evaluating my ruling.

9 MR. HERBERT: I misunderstood that.

10 MR. ELKIND: That is the purpose it ought to be  
11 in there.

12 You agree that is the coroner's finding?

13 MR. HERBERT: As to where the bullet entered?

14 Oh, yes. I can't dispute that, Mr. Elkind.

15 MR. ELKIND: The third thing, and we may have  
16 covered this and I may be being overly cautious, but I would  
17 like a stipulation that he was shot between 128th and 129th  
18 Street. Now, where in that area I am not asking for any  
19 stipulation to, but that he was in between those two streets  
20 when he was shot. I think that is in your trial memo. I  
21 think you mentioned it in your opening.

22 MR. HERBERT: I do know that the shot was fired  
23 from a roof top of a building fronting Park Avenue between  
24 128th and 129th, and I do know that the decedent was in the  
25 track bed, between tracks two and four, at a distance of

2 approximately 300 feet from 125th Street station.

3 MR. ELKIND: Would that be between 128th and 129th?

4 MR. HERBERT: I don't really know.

5 THE COURT: Does it make any difference to you that  
6 he wants to stipulate that?

7 MR. HERBERT: I will stipulate that he was 300  
8 feet, when he fell from the train his body was 300 feet,  
9 approximately 300 feet from the station platform.

10 MR. ELKIND: Are you saying that his body was  
11 found 300 feet from the 125th Street station or that he  
12 was shot 300 feet from it?

13 THE COURT: His body was found.

14 MR. HERBERT: That is where his body was found.  
15 I know the shot was fired from a roof top located in a  
16 dwelling located between 128th and 129th. Whether the  
17 gunman was shooting uptown or downtown or not I don't really  
18 know. I do know where his body was found from what the  
19 police indicated, you see.

20 MR. ELKIND: That doesn't really fulfill my need.

21 THE COURT: You have that stipulation, you have the  
22 evidence as to what Mr. McGeoch said about the speed of the  
23 train and the length of time and you can make your own  
24 deductions.

25 MR. ELKIND: I have, your Honor, one sheet from

1 rd/lf/6

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3 the police department of the City of New York, Engineering  
4 Section, that was furnished, as I understand the sequence,  
5 where this document was furnished to Juron & Minzner in  
6 response to certain interrogatories that they had served  
on you.

7 MR. HERBERT: May I see the document?

8 MR. ELKIND: That is the one I sent you a copy  
9 of.

10 MR. HERBERT: The first time I saw this document,  
11 which I think might be appropriate to mark for identification  
12 so we know what we are talking about, was when Mr.  
13 Elkind forwarded me a copy.

14 MR. ELKIND: You did not furnish that to Juron &  
15 Minzner in the first place?

16 MR. HERBERT: No.

17 MR. ELKIND: How did I get it?

18 MR. HERBERT: From Juron & Minzner but I do know  
19 they did not get it from me.

20 MR. ELKIND: Do you have the original answers to  
21 interrogatories? They have been filed here, right? Yes.

22 MR. HERBERT: Their answers?

23 MR. ELKIND: Your answers.

24 MR. HERBERT: I have my answers.

25 MR. ELKIND: Can I see them?

2 THE COURT: The police department estimates the  
3 impact at 60 feet north of where the body was found. Do  
4 you accept that?

5 MR. HERBERT: I can't quarrel with it, your Honor.  
6 I know Mr. Elkind did ask me if I would admit to the authenticity  
7 of that document, and I told him that I really found it  
8 difficult to admit to the authenticity because that is not  
9 a complete document. There should be, I would assume, one  
10 more page to it. I believe that that document was prepared  
11 for the purpose of determining the angle of the bullet.

12 THE COURT: I don't see it makes much difference.

13 MR. HERBERT: I would certainly suppose -- what  
14 was it you asked me to admit, your Honor?

15 THE COURT: That the point of impact of the bullet  
16 was 60 feet north of where the body was found.

17 MR. HERBERT: I'll admit to that because I think  
18 I recall the statements from my witnesses that the train  
19 traveled about a half a car length beyond where the shot was  
20 fired.

21 MR. ELKIND: Okay.

22 THE COURT: 360 feet from the station.

23 Anything else?

24 MR. ELKIND: Yes. I'm sorry. On the future  
25 earnings --

1 rd/lf/8

2 THE COURT: On the what?

3 MR. ELKIND: Future lost earnings of the  
4 decedent. Now, there have been a number of increases to  
5 men -- for men doing the kind of work that the decedent was  
6 performing for the railroad. They were naturally bargained  
7 increases. Most of the time they are on a percentage basis  
8 or can be reduced to percentages. We worked out the calcula-  
9 tions giving effect to these increases over the years up to  
10 1974 because we don't know what the future is. The amounts  
11 are not in dispute, but what has been in dispute is the formula  
12 for the language to present it to the jury.

13 THE COURT: Why not cancel out the increases against  
14 the -- discounting the verdict?

15 MR. ELKIND: I would do that on future increases.  
16 That is very fair. In fact, I would do that with the jury  
17 in argument in any event.

18 MR. HERBERT: No, your Honor, I could not because  
19 the Supreme Court in Kelly versus Baltimore and Ohio Railroad  
20 has ruled that with respect to future loss of earnings or  
21 future pecuniary loss it must be reduced down to its present  
22 value.

23 THE COURT: I know, but the Supreme Court didn't  
24 say you couldn't waive that. He is entitled to have the  
25

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2 basis of whether he was going to do what I am suggesting  
3 and that would cancel that out and don't talk about any future  
4 increases and cut out discounting the verdict.

5 MR. HERBERT: I would suggest the Court might be in  
6 error because a jury is not allowed to speculate on anything.

7 THE COURT: Not speculate, a basis. There are  
8 plenty of economists --

9 MR. HERBERT: Economists today can't agree on what  
10 the future holds for us so how could you expect the jury to  
11 base a determination on what the future may hold. We are now  
12 going through a period of recession.

13 MR. ELKIND: What I would like to work out, Mr.  
14 Herbert, is a way of presenting at least the past lost earnings  
15 to the jury, that is, the earnings over the past five years.

16 MR. HERBERT: Taking into account the increases  
17 that have occurred?

18 MR. ELKIND: Yes. The mathematics of which we are  
19 in agreement on. It is just that he wants to put in all  
20 kinds of provisos. They are right, but if he puts in his  
21 provisos, in order to equalize I have to say that this also  
22 doesn't mean that the man might not work more often, it  
23 doesn't mean that he might not have gotten an increase. There  
24 are all kinds of speculations that would affect that.

25 THE COURT: Why don't you put in the evidence, you have

what

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3 got and make whatever arguments you want.

4 MR. HERBERT: The evidence Mr. Elkind is referring  
5 to is in particular a notice to admit that was served upon  
6 me, and I made admissions subject to certain conditions  
under which I would make that admission.

7 MR. ELKIND: This is the notice to admit on  
8 earnings (handing).

9 THE COURT: You admitted this?

10 MR. ELKIND: These are the qualifications he would  
11 like (indicating).

12 THE COURT: Well --

13 MR. ELKIND: They are all argumentative,  
14 properly argumentative and I don't see any reason why they  
15 can't argue it to the jury.

16 What I'm trying to do is to find out perhaps if  
17 your Honor can find out some way of presenting the basic figures  
18 so I can avoid putting on the evidence covering the increases,  
19 how they are arrived at, what the guarantee means and all of  
20 that which is just a bunch of junk.

21 THE COURT: Why don't you just put in these figures  
22 and you can argue about all the possibilities of increase  
23 and you can argue about the possibilities of decrease.

24 MR. HERBERT: I have to argue those.

25 MR. ELKIND: I don't want to stipulate you out of

1 rd/lf/11

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2 anything.

3 THE COURT: Just put in these figures.

4 MR. HERBERT: I'm losing enough as it is, Mr.  
5 Elkind.

6 THE COURT: Put in the figures that are admitted  
7 assuming no changes in the future, and you argue for  
8 possibility for possible changes in the future and you argue  
9 it the other way.

10 MR. HERBERT: May I give that some thought about  
11 no changes in the future?

12 Mr. Elkind, as far as his past wages are con-  
13 cerned --

14 THE COURT: You have all your arguments set forth  
15 right here, he may get fired, there may be a depression,  
16 and a number of other things.

17 MR. HERBERT: He may have been dead from other  
18 causes, I don't know. You see, your Honor, what my problem  
19 with respect to this judicial admission is that he asked me  
20 to admit virtually that this is what this man would have  
21 earned had he continued to live and had he continued to work  
22 for the railroad. Goodness sakes, if I just said yes to it,  
23 he could pick it up in court and read it to the jury and would  
24 say that the railroad has admitted these are what his earnings  
25 are and I would have been stuck with it. I don't think it

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2 was a fair request.

3 MR. ELKIND: Oh, come on.

4 THE COURT: You have the exact figures through  
5 1973.

6 MR. HERBERT: He has a witness in court, Mr.  
7 Loconto, and I think he would stipulate what the past -- what  
8 it would have been reasonable for this man to earn in the  
9 past, is that correct?

10 THE COURT: Who is Mr. Loconto?

11 MR. HERBERT: I think he is a union representative  
12 of the decedent, your Honor.

13 THE COURT: Get the evidence in.

14 MR. HERBERT: I would like to call to the Court's  
15 attention, and I did speak to Mr. Elkind about this, there  
16 was a request for an admission with respect to the loss of  
17 guidance and training to these youngsters, and Mr. Elkind  
18 did set forth, and I admitted in large degree, that that is  
19 what it would have been, until they reach the majority of  
20 age 21.

21 Well, I would call to the Court's attention that  
22 effective September 1, 1974, the statutes of the legislature  
23 of New York is changed. The legal age is eighteen.

24 MR. ELKIND: Not for dependency. We checked it.

25 MR. HERBERT: You did, Mr. Elkind?

1 rd/1f/13

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2 MR. ELKIND: Let me tell you what it says. Chapter  
3 920 of the laws of 1974, amending the Domestic Relations  
4 law with respect to the age of majority makes no change in  
5 the Uniform Support of Dependence law. Codified in Domestic  
6 Relations law 3222, which provides father is liable for the  
7 support of his child or children under the age of 21 years  
8 of age. It only affects marriage age.

9 MR. HERBERT: I know it affects age for many  
10 other things, too. I'll have to check that out. If you  
11 have checked it, then I'm not going to ask you to admit that  
12 it is eighteen. I can't change the law.

13 THE COURT: Let's proceed.

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CROSS EXAMINATION OF JOHN LOCONTO

3 BY MR. HERBERT:

4 Q Mr. Loconto, you told us how a guarantee, a monthly  
5 guarantee is arrived at, and would it be fair to state that  
6 you would take Mr. Burns' guarantee of 1968 and apply to  
7 that guarantee the increases that have become effective in  
8 the period of time since January 1, 1970?

9 A Yes, they would apply -- each increase would apply  
10 to the guarantee. They actually compound themselves.

11 Q Now, in using as a comparison the guarantee of  
12 Mr. Harris, is Mr. Harris on the same roster that Mr. Burns  
13 was on?

14 A He is on the same roster, he works the same extra  
15 list, works the same jobs, and their seniority is practically  
16 the same.

17 Q What was the seniority of Mr. Burns?

18 A Mr. Burns?

19 Q Yes, sir.

20 A November 30, 1945.

21 THE COURT: That means that is the date he got  
22 his job?

23 THE WITNESS: Yes.

24 THE COURT: What about Mr. Harris?

25 THE WITNESS: I thought I had it on the same page.

1 rd/lf/2

Loconto-Cross

2 (Pause)

3 A I'm having a little trouble because this is an  
4 old seniority list.

5 (Pause)

6 Q Well, Mr. Loconto, Mrs. Harris is in the courtroom,  
7 is she not?

8 A Yes. She probably knows.

9 Q And Mrs. Harris is the sister of Mrs. Burns?

10 A Yes.

11 MR. HERBERT: To save the time of the Court, would  
12 you have objection if I ask Mrs. Harris the seniority date  
13 of her husband?

14 THE COURT: If she knows.

15 MRS. HARRIS: September 6, 1945.

16 Q May I ask, Mr. Loconto, what records you have  
17 before you that you are referring to?

18 A The seniority roster, January 1, 1969, and I have  
19 found Mr. Harris' name, November 6, 1945, and here is Burns.

20 THE COURT: So Mrs. Harris was correct?

21 THE WITNESS: Yes.

22 Q Mr. Loconto, how many men were senior to Mr. Burns  
23 and junior to Mr. Harris?

24 MR. ELKIND: I don't see what relevancy that  
25 could have, your Honor. I object, your Honor.

2 THE COURT: I'll allow it.

3 THE WITNESS: The various men between Mr. Harris  
4 and Mr. Burns, some work in Albany, some work in West 72nd  
5 Street, some work in West 33rd Street, but I will give you  
6 the number of men that work on the Hudson Division, which  
7 we are talking about.

8 Q My only question, Mr. Loconto, was how many men  
9 between those two men?

10 A There are eight men between Mr. Harris and Mr.  
11 Burns.

12 THE COURT: Who work in the Hudson Division?

13 THE WITNESS: Who work in the Hudson Division, four  
14 of which are promoted conductors at this time.

15 THE COURT: Don't go beyond the question.

16 Q Do you have available to you what the guarantees  
17 of those eight men are as you had for Mr. Harris?

18 A No, I don't.

19 Q You have indicated, Mr. Loconto, that a man would  
20 have deducted from his guarantee a sum of money representing  
21 what he may have earned on a day that he may have marked  
22 off, is that right?

23 A Right.

24 Q And would it also be fair to assume that if a man  
25 was out ill and didn't work for a period of time, that that

2 would have to be deducted from his guarantee?

3 A Those days that he was off for personal reasons,  
4 illness or otherwise.

5 THE COURT: In other words, the guarantee, as I  
6 understand it, only operates if you are ready to do the job?

7 THE WITNESS: Yes.

8 THE COURT: If you are ready and willing and there  
9 is no job, you get the money?

10 THE WITNESS: Right.

11 THE COURT: If there is a job and you are not  
12 ready and willing, you don't?

13 THE WITNESS: Yes.

14 Q Were you acquainted with George Burns?

15 A Was I acquainted with George Burns?

16 Q Yes, did you know George Burns?

17 A Yes.

18 Q Was Mr. George Burns a qualified conductor?

19 A Yes, sir.

20 Q And what was the date that he qualified as a con-  
21 ductor in passenger service, Mr. Loconto, please?

22 A Passenger conductor?

23 Q Yes.

24 A 10/22/61.

25 THE COURT: So since October 22, '61, he had been a

2 qualified passenger conductor?

3 THE WITNESS: He would have been qualified but not  
4 actually working as such.

5 THE COURT: He would only be working as such if  
6 somebody senior to him wasn't available?

7 THE WITNESS: Yes.

8 Q Do you know whether or not Mr. Burns ever worked  
9 in passenger service as a brakeman?

10 A Do I know if he ever worked in passenger service  
11 as a brakeman?

12 Q Yes, as a brakeman.

13 A Yes.

14 Q Did he work in passenger service as an assistant  
15 conductor?

16 A No, he was not a qualified assistant conductor.

17 Q I didn't ask you whether he was qualified. I  
18 asked you whether he had worked as an assistant conductor.

19 A He may have picked up transportation as an assistant  
20 conductor-brakeman. That is a different category, all  
21 those that is picking up transportation.

22 THE COURT: Tell me, just for my curiosity, how  
23 could he be qualified as a conductor and not as an assistant  
24 conductor?

25 THE WITNESS: Very complicated. An assistant

1 rd/lf/6

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Loconto-Cross

2 conductor has a separate roster themselves and they could  
3 qualify as a passenger conductor without going through the  
4 assistant conductor process.

5 THE COURT: I see. I assume if you are qualified  
6 as a conductor as a practical matter you can do anything  
7 an assistant conductor could do?

8 THE WITNESS: You could do that kind of work but  
9 you cannot infringe upon those jobs that belong to the  
10 assistant conductor.

11 THE COURT: That is seniority and union, but as  
12 far as the qualifications to operate, your ability to work,  
13 you can do it?

14 THE WITNESS: You can do it, yes.

15 THE COURT: I see.

16 Q Do you know whether Mr. Burns had worked as a  
17 conductor in passenger service?

18 A I recall him working as a conductor, yes.

19 Q And was he qualified as a conductor and a  
20 qualified brakeman?

21 A Yes.

22 MR. ELKIND: That is repetitious.

23 THE COURT: It is. It has already been established  
24 that he was both.

25 Q Did Mr. Burns ever complain to you of stonings in

1 rd/lf/7

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Loconto-Cross

2 the area of 125th Street?

3 A No, sir.

4 Q Mr. Loconto, you said that you -- in response to  
5 a question of Mr. Elkind that you were the chairman of the  
6 local in which Mr. Burns was a member.

7 A Yes, sir.

8 Q Chairman of the local grievance committee and  
9 something else which I didn't catch the rest of. Was Mr.  
10 McGeoch also in your -- represented by you? Were the train-  
11 men on the Hudson Division represented by you?

12 A I represented Mr. McGeoch at one time, and I don't  
13 recall when he got promoted to a regular conductor, at which  
14 time he transferred to a conductor's local and I no longer  
15 represented him.

16 And if I recall, at that particular time I did not  
17 represent him.

18 THE COURT: You mean at the time of the accident?

19 THE WITNESS: Yes.

20 THE COURT: But you had previously?

21 THE WITNESS: Prior to that I had.

22 Q Is it part of your job and have you ever in the  
23 past spoken with your men and represented them in any  
24 grievances they had with respect to the management of the  
25 railroad?

2           A     At times I have spoken to them about grievances,  
3       yes.

4           Q     And have you as the chairman of the grievance  
5     committee from time to time passed on complaints that your  
6     members may have registered to you or called your attention  
7     to with respect to the working conditions that they face from  
8     day to day?

9           A     Yes.

10          Q     And have you from time to time been made aware by  
11    those whom you represent of certain unsafe practices that  
12    you feel should be called to the attention of the railroad?

13          A     Would you repeat that again?

14          Q     Yes, sir. Have you from time to time called the  
15    attention of the railroad management to any unsafe practices  
16    which may have been called to your attention by the men whom  
17    you represent?

18          A     I have at times, and there is a legislative depart-  
19    ment that does likewise.

20          Q     Were you familiar with the practice of trainmen  
21    on the Hudson Division to open and close trap doors while  
22    the train -- before the train has arrived and come to a  
23    stop at the station at 125th Street?

24          A     I'm familiar.

25          Q     And have you at any time ever recommended to the

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2 management that employees be prohibited from opening and  
3 closing trap doors of trains until the train is actually  
4 at the station at 125th Street?

5 A No, sir.

6 THE COURT: I assume you just meant opening.  
7 There is no evidence that they were closed.

8 MR. HERBERT: I'm sorry, your Honor, I didn't hear  
9 you.

10 THE COURT: You said opening and closing. There  
11 is no evidence that anybody closed the doors before they  
12 went to the station. I assume you meant opening.

13 MR. HERBERT: For the purposes of this trial I will  
14 consent to that deletion.

15 Q Mr. Loconto, employees who work in train service, in  
16 passenger service, do they generally have one or two round  
17 trips to make each day?

18 A Trainmen in passenger service during the week have  
19 two round trips, Saturday and Sunday one round trip. When  
20 I say round trip, Croton, Grand Central and back, Croton  
21 Grand Central and back.

22 THE COURT: That is two round trips you just  
23 described?

24 THE WITNESS: Yes.

25 Q So that if a man were called to cover a particular

2 job in the passenger list on a week day to fill someone --  
3 say a man was ill and a man from the extra brakemen list  
4 would be called to take his place, would he then take his  
5 place for the two round trips?

6 A If the job is open for a whole day or any number  
7 of days he would cover the entire assignment for that day.

8 Q Are there occasions, Mr. Loconto, where the men  
9 have time between runs where they are not actually  
10 working?

11 A Yes.

12 Q And do they have any place where they can spend  
13 their time, any employees' room or locker room or anything  
14 like that?

15 MR. ELKIND: I object. I don't know what that has  
16 to do with this case or where he is talking. I object to  
17 the form of the question.

18 THE COURT: Maybe I'll find out. It doesn't seem  
19 prejudicial in any event.

20 MR. ELKIND: I object to the form of the question.

21 THE COURT: Overruled.

22 Do you understand the question?

23 THE WITNESS: When we get to Grand Central I have  
24 the schedule so arranged that the men that live in the  
25 upper end of the county return back and, for the most part,

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2 they go home, and those people who live in New York or the  
3 lower end of the county, their job starts from Grand Central,  
4 go to Croton, returns to Grand Central and many of them go home  
5 during that swing period. Some have other assignments during  
6 their swing period, and some stay in the brakemen's room  
7 or conductors' room in Grand Central terminal.

8 THE COURT: What about Croton, is there a brakemen's  
9 room there?

10 THE WITNESS: No, there isn't any brakemen's room  
11 in Croton.

12 Q Do you recall any of your -- any of the men you  
13 represent making any complaints with respect to the throwing  
14 of stones in the area between 125th and 130th Street?

15 A No, sir.

16 Q They have made complaints, have they not, with  
17 respect to the throwing of stones at locations other than and  
18 different from this area I am speaking of, 125th Street-138th  
19 Street?

20 A Not to me. Normally the stone throwing reporting  
21 is done immediately by the particular train to the dispatcher,  
22 to the company itself, not to me.

23 Q Are you aware of any trainmen ever being shot  
24 and killed or shot and killed while performing duties on a  
25 train in the vicinity of 125th Street-130th Street, Manhattan,

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2 prior to this particular instance?

3 A Prior to?

4 Q Yes, sir.

5 A No.

6 THE COURT: Did you intend that negative pregnant  
7 to be in your question? You said shot and killed.

8 Q Did you ever have any train in that area shot at  
9 that you were aware of?

10 A Not that I am aware of.

11 MR. HERBERT: Thank you, Mr. Loconto.

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THE COURT: While we are waiting for the jury to  
3 leave, Mr. Herbert, you will remember I said that I was  
4 finding that he had established that it was an intentional  
5 shooting. I think on reconsideration I talked too fast. I  
6 think they have offered evidence from which the jury could  
7 find it was an intentional shooting.

8 MR. HERBERT: I didn't hear the last part.

9 THE COURT: I said I think they have offered  
10 evidence from which the jury could find it was an intentional  
11 shooting.

12 Now, if you want me to submit that question to the  
13 jury, I will, but in that event we would have to put on the  
14 record before them the fact the bullet went through the  
15 heart which is not now on the record, only there for the  
16 purposes of relevant review.

17 Why don't we finish the whole question and treat  
18 it as though it were established and give them the law, on  
19 the assumption of not giving them the fact. You don't have  
20 to decide it now.

21 MR. HERBERT: The reason why I felt it was  
22 important to make a determination on that evidence being  
23 introduced, on the question of how this occurred, to wit, was  
24 it intentional or was it accidental, or on the question as  
25 to whether or not the evidence of other intentional torts --

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2 THE COURT: I understand your point. If you want  
3 me to, I will submit it to the jury.

4 MR. HERBERT: Since you have already ruled against  
5 me on that issue as to that and you have allowed into evi-  
6 dence --

7 THE COURT: I will tell them they should ignore  
8 it unless they find it was -- I'm perfectly willing to submit  
9 to them the question of whether this was intentional or not  
10 intentional and tell them if they find it was not intentional  
11 they should ignore this testimony about the stoning.

12 MR. HERBERT: I would think there would be  
13 sufficient reason for them to ignore the evidence of stonings  
14 as well.

15 THE COURT: You have made your argument on that  
16 and I have rejected it. I told you it was intentional. In  
17 thinking it over I am usurping the jury's function, which I  
18 have no business in doing. If you want me to, I will submit  
19 that question to the jury and tell them that if they find it is  
20 more probable that not that it was intentional, then they  
21 should ignore the evidence of the stoning.

22 Otherwise, I just won't refer to it. I will just  
23 let it go as it is on the assumption that it was intentional,  
24 which I am sure everybody assumes. If I do that we will have  
25 to re-open the record before the jury to permit putting in

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2 the coroner's report which shows it went through the heart,  
3 which I think is relevant on the issue.

4 MR. HERBERT: I will advise the Court, if the Court  
5 wants me to, tomorrow what my position will be. But I would  
6 submit that even with that additional suggested evidence it  
7 still would have no bearing or proof --

8 THE COURT: On the state of the record as it  
9 now stands if you should advise me that you don't want me  
10 to go into this, then you would have a claim of error to the  
11 extent that I should not have submitted it to the jury at  
12 all. I should have taken it away from the jury and ruled  
13 that on no phase of the facts could the jury have found it  
14 was intentional.

15 That would be your claim of error. But if I hadn't  
16 brought this up I think you would have had a further claim,  
17 namely, that I took a question away from a jury and told them  
18 they had to find it was intentional, which I don't think  
19 I'm justified in doing.

20 However, from your point of view you may very  
21 well not wish me to go into it.

22 MR. HERBERT: I am saying even what the Court  
23 might suggest the fact that he was shot through the heart,  
24 even with that in I still would submit no matter what you do  
25 that it is still insufficient for them to make a determination.

2 THE COURT: You still have that.

3 MR. HERBERT: It doesn't make any difference to  
4 me at this juncture but I will advise the Court tomorrow.

5 THE COURT: Now, on the question of the expectancy  
6 tables, it seems to me as far as Mrs. Burns' expectancy,  
7 expectancy as of today is relevant and not at the time it  
8 happened.

9 MR. ELKIND: The expectancy in March of 1969.

10 THE COURT: What relevance has that got? The jury  
11 has to determine how much damage Mrs. Burns is likely --  
12 supposing she died yesterday, there would be no more case.

13 MR. ELKIND: There would be a case from March, '69,  
14 until the day she died.

15 THE COURT: The expectancy tables would have been  
16 irrelevant if she died yesterday. The question is how long will  
17 she live and the expectancy tables are as of today, not at the  
18 time of the killing.

19 MR. HERBERT: This might be more appropriate  
20 discuss in chambers.

21 THE COURT: I don't see why. We are here.

22 What difference does it make what the life expectancy  
23 was five years ago?

24 MR. ELKIND: Because that was the time.

25 THE COURT: I know but the jury is determining

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2 damages today, not five years ago.

3 MR. ELKIND: The damages don't run from today, the  
4 damages run from March, '69.

5 THE COURT: Today they are trying to decide how  
6 much damage she will suffer until she dies. Supposing the  
7 case was 20 years after the trial. And the way you fellows  
8 are delaying it, this might well happen.

9 MR. HERBERT: Flattery will get you nowhere, your  
10 Honor.

11 THE COURT: Supposing the trial was 20 years after  
12 the accident and the expectancy tables showed she had been  
13 dead for five years, is that what you will give the jury?

14 MR. ELKIND: No, I'm familiar with that.

15 THE COURT: Supposing it is 20 years?

16 MR. ELKIND: One figure is a multiplier. I suppose  
17 it is for the purpose of simplifying the presentation of the  
18 issue to the jury.

19 THE COURT: It doesn't simplify it at all. Give  
20 her one figure. You give the jury one figure and that is her  
21 life expectancy as of today. Supposing it was 20 years after  
22 the accident that it came to trial. The life expectancy  
23 tables showed that she had been dead for five years, how do  
24 I charge the jury?

25 MR. ELKIND: Well, your Honor --

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2 THE COURT: Will you lawyers answer the simple  
3 questions I ask. Supposing the trial took place 20 years  
4 after the accident. Expectancy tables showed at the time of  
5 the accident that she has been dead for five years. She looks  
6 healthy to me. How do I charge the jury?

7 MR. ELKIND: You don't charge the expectancy  
8 tables.

9 THE COURT: Why not? How is the jury going to  
10 determine what her likely damage is going to be if I don't  
11 charge the expectancy table?

12 MR. HERBERT: Your Honor, I think the proper  
13 rule is to charge the expectancy tables at the time of death  
14 with respect to Mr. Burns and the expectancy tables as of the  
15 day of trial with respect to Mrs. Burns.

16 THE COURT: That is what I have said and that is  
17 what it will be. That is in your favor and against him and  
18 he wants it and that is fine.

19 MR. ELKIND: It is the other way around. I know  
20 that it is actually in my favor.

21 THE COURT: So will you work out the expectancy  
22 table?

23 MR. ELKIND: Can we go on a related and tangential  
24 subject?

25 THE COURT: Yes.

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2 MR. ELKIND: To my mind it makes this question  
3 academic. Since there is such a disparity in the life expectancies  
4 of Mr. Burns and Mrs. Burns, that is, since it appears Mr.  
5 Burns would have died first, the only figure we really need  
6 to be concerned with is Mr. Burns. I don't know why we are  
7 talking about Mrs. Burns.

8 THE COURT: I agree with you there. That solves  
9 the whole problem.

10 MR. HERBERT: It isn't necessary to charge  
11 the expectancy tables of the youngsters either.

12 THE COURT: That is true.

13 MR. ELKIND: It is 21 years, your Honor.

14 THE COURT: Why didn't you say that in the first  
15 place.

16 MR. HERBERT: What is the figure, \$470 added onto  
17 those figures?

18 MR. ELKIND: Yes.

21 \* \* \* \* \*

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2 TERESA M. BURNS

3 vs.

69 Civ. ~~4500~~

4 PENN CENTRAL COMPANY

5 September 12, 1974  
6 1:15 P.M.

7 (Jury Not Present)

8 (In Open Court)

9 THE COURT: Mr. Herbert, do you have a motion?

10 MR. HERBERT: Yes, I do, your Honor.

11 At this time the defendant would move the Court  
12 to dismiss the complaint and to direct a verdict in favor of  
13 the defendant on the ground that the plaintiff has failed to  
14 sustain their burden of proof in this case with respect to the  
15 foreseeability of the occurrence complained of, with respect  
16 to any negligence that was committed by the railroad which  
17 contributed in whole or in part to the happening of the  
18 accident.

19 The record is completely devoid of any evidence  
20 showing foreseeability of any criminal assault upon this  
21 decedent.

22 I think that under the holdings of Lillie versus  
23 Thompson and Hartel versus the Long Island Railroad and the  
24 Herman case, Inman versus Baltimore and Ohio Railroad Company,  
25 there is absolutely no proof of foreseeability that Mr. Burns

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2 was struck down by an armed criminal.

3 Well, may I have the Court's ruling on that?

4 THE COURT: Decision reserved.

5 MR. HERBERT: In addition, your Honor, the defen-  
6 dant would also move to have stricken from the record and  
7 have the jury instructed to totally disregard evidence of  
8 any stoning incidents in the area in question as they are not  
9 material or relevant to the issues in this lawsuit, and my  
10 motion is based upon all the reasons why I felt that such  
11 evidence was inadmissible which was set forth in my trial  
12 memorandum.

13 THE COURT: Motion denied.

14 MR. HERBERT: Your Honor, you will recall that in  
15 a conference in chambers some while ago I did ask the Court,  
16 when I referred to my memorandum, to have my memorandum as  
17 an exhibit. Has the Court marked the memorandum as an exhibit?  
18 And if so, what was the exhibit number?

19 THE COURT: Why don't we just mark it Court's  
20 Exhibit number 1 now. Do you have a copy in your hand?

21 MR. HERBERT: I gave the Court two copies of my  
22 memorandum. This is the only one I have.

23 THE COURT: It will be marked Court's Exhibit 1 in  
24 due time.

25 MR. HERBERT: We have already discussed the second

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2 cause of action which is no longer in the lawsuit.

3 THE COURT: I understand the second cause of action  
4 is withdrawn.

5 MR. HERBERT: Yes.

6 THE COURT: Now, what is your pleasure on the  
7 question of intentional shooting?

8 MR. HERBERT: Well, your Honor, the Court has  
9 already made a determination on that, and I had to act and  
10 rely upon what the Court's determination was. I believe  
11 the Court has already ruled that it was intended -- that  
12 the assailant intended to shoot r. Burns, is that correct?

13 THE COURT: No, I didn't rule that. I said that  
14 and then yesterday afternoon I said that I realized I had no  
15 right to take that question away from the jury if you didn't  
16 want me to.

17 As far as I am entitled to rule is that the defendant --  
18 plaintiff rather has made a prima facie case on the question of  
19 whether it was an intentional -- that it was an intentional  
20 shooting. And if you want me to I will submit that question  
21 to the jury.

22 MR. HERBERT: Well, your Honor, I would have to  
23 take exception to your submitting that question to the jury  
24 because I don't feel there is sufficient evidence to submit  
25 it to the jury from which they can draw a conclusion one way or

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2 the other.

3 THE COURT: I understand. You have your exception  
4 to that.

5 MR. HERBERT: So you can't very well agree with the  
6 Court that that question should be submitted to a jury because  
7 there is no evidence to support it.

8 THE COURT: I am not asking you to agree. You  
9 have your exception to my intention to submit it to the jury.

10 Now, the second question I posed to you, without  
11 waiving that exception, do you want me to submit it to the  
12 jury? In other words, or do you just want me to assume it  
13 is established? You will have an exception to my determination  
14 that they have made a prima facie case. It seems to me it  
15 would be to your advantage, as I told you if I submit  
16 the question to the jury I will have to permit plaintiff to  
17 re-open the case technically for the purpose of bringing  
18 the jury's attention, which was stipulated in the absence of  
19 the jury, namely that the bullet went through the heart, be-  
20 cause it seems to me that is highly significant on the question  
21 of whether it was intentional or not.

22 MR. HERBERT: Even if that stipulation were to  
23 have been entered in the record, your Honor, and even if it  
24 were to have been called to the attention of the jury, I  
25 think that that still is insufficient.

2 THE COURT: You have that point in the record.  
3 If the state of the record is that I should not submit that  
4 question to the jury, you have reversible error clear as a  
5 bell. However, I having ruled that, I am perfectly willing  
6 to just charge the jury on the assumption that it was an  
7 intentional act, which assumption I point out that you made  
8 in your motion to dismiss. You talked about the railroad had  
9 no way of anticipating that he would be shot by an armed  
10 criminal, and that assumed it was intentional.

11 I am certain the jury would come to the same assumption  
12 if I submitted it to them.

13 Now, I'm perfectly willing just to submit the case  
14 to the jury just on the assumption that it was an armed  
15 criminal act without going into it. You are entitled to have  
16 them consider that if you want to.

17 MR. HERBERT: Well, your Honor, I think that  
18 because of the Court's earlier rulings on this --

19 THE COURT: The Court's earlier ruling had nothing  
20 to do with it. I made a mistake in saying that I thought it  
21 was established. I'm correcting that mistake. I have no  
22 right to say it was established. The jury is entitled to pass  
23 on that if you want them to. I ruled it is a jury question.  
24 As to that you have an exception.

25 MR. HERBERT: I know that, your Honor.

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2 THE COURT: Now do you want me to submit it to the  
3 jury or don't you, yes or no?

4 MR. HERBERT: I will say that in view of the fact  
5 that the case has been tried on the assumption --

6 THE COURT: The case hasn't been tried on anything  
7 of that theory. The only action or inaction that was taken  
8 on the basis of my having said it was established was that  
9 I excluded the evidence of the heart.

10 MR. HERBERT: And you have admitted the evidence  
11 of the stone throwings.

12 THE COURT: That is admitted and that you have  
13 exception to. The question I'm asking --

14 MR. HERBERT: I am saying we will try it on the  
15 basis of the assumption it was an intentional act, your Honor.

16 THE COURT: You have an exception to my ruling  
17 that that is a jury question. You do not have an exception  
18 to my failure to present it to the jury as a question under  
19 the appropriate charge.

20 MR. HERBERT: I have already indicated to you  
21 why I think it should not be submitted.

22 THE COURT: Yes.

23 MR. HERBERT: I am indicating to you now since  
24 I feel the case has been tried on this assumption and the  
25 Court advised me yesterday of its second thoughts, I think

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2 it is too late to assume otherwise.

3 THE COURT: It was a jury question.

4 MR. HERBERT: I assume from the Court's earlier  
5 ruling --

6 THE COURT: You didn't take any action on the  
7 basis of that assumption. You wouldn't have done anything  
8 differently when I told you it was a jury question than when  
9 I have ruled on it.

10 MR. HERBERT: I feel I have made my position to the  
11 Court with respect to this particular issue and I made my  
12 position to the Court earlier in the trial, at which time --

13 THE COURT: Your position is there is nothing in  
14 the record which would permit the jury to find that it was  
15 intentional.

16 MR. HERBERT: That's correct.

17 THE COURT: You have an exception to my ruling  
18 against you on that position.

19 MR. HERBERT: Yes, but will the Court allow me to  
20 set forth the reason why I am now going to agree that it should  
21 not be submitted to the jury?

22 THE COURT: Yes, if they are valid reasons.

23 MR. HERBERT: All I'm suggesting and I want the  
24 record to show is that I am consenting that the issue as to  
25 whether it was intentional or not intentional not be submitted

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2 to the jury because on the basis of the Court's earlier --

3 THE COURT: Not on the basis of the Court's  
4 earlier ruling. All past rulings are revoked except the  
5 only ruling I now make is that it is a jury question. If you  
6 want the case to proceed on that basis, the only change in  
7 evidence that I can think of that would conform to that basis  
8 is to permit proof of where the bullet entered. If you want  
9 to make that change, we will submit it. If you want to make  
10 any other change you can think of or state anything that  
11 you would have done differently had I made that ruling in  
12 the first place, I will entertain your application to change  
13 it or a motion for a mistrial if you can't change it but  
14 don't try to jockey me around into saying I have excluded  
15 anything from you because I haven't.

16 MR. HERBERT: I am not suggesting to the Court  
17 that you are trying to jockey me around.

18 THE COURT: You are trying to jockey me around.  
19 I'm not saying I'm trying to jockey you around.

20 MR. HERBERT: The Court has had second thoughts  
21 with respect to whether it was intentional or not.

22 THE COURT: Don't keep repeating it. I have said  
23 it ten times I have had second thoughts. What do you want me  
24 to do now?

25 MR. HERBERT: It will not be necessary to submit

2 the question to the jury and I have my exceptions.

3 THE COURT: You have your exception.

4 Anything else?

5 Just for my information, what evidence do you  
6 suggest, unless you plan to offer some now, up till now I see  
7 no evidence in the record which would support a charge of  
8 contributory negligence.

9 MR. HERBERT: The question, your Honor, is whether  
10 or not the railroad should have foreseen the likelihood of  
11 a shooting of Mr. Burns. I say it was not foreseeable for  
12 the railroad and it was not --

13 THE COURT: Well --

14 MR. HERBERT: You keep interrupting me, Judge.

15 May I please put myself on the record?

16 THE COURT: Surely.

17 MR. HERBERT: This occurrence, this unfortunate  
18 occurrence, this shooting was not foreseeable. The railroad  
19 could not foresee it and Mr. Burns could not foresee it, and  
20 I would say that that is the issue here. Certainly if it  
21 was foreseeable for the railroad, it was foreseeable to Mr.  
22 Burns and I think that is sufficient right there.

23 THE COURT: As far as I can see the only theory,  
24 and you don't think it is a good theory and Lord knows, the  
25 Court of Appeals may agree with you, but the only theory

2 which the plaintiff contends it was foreseeable were these  
3 stonings, and the evidence -- there is not a scintilla of  
4 evidence that Mr. Burns knew anything about those.

5 MR. HERBERT: The issue, your Honor, is could we  
6 have foreseen that Mr. Burns would suffer such an accident  
7 as befell him.

8 THE COURT: The only ground they say you should  
9 have foreseen it is you knew about these stonings. Now, you  
10 say that is not a ground and the Court of Appeals may well  
11 agree with you, assuming the jury doesn't. But assuming  
12 that is a ground, and the only ground that I can see, there  
13 is not a scintilla of evidence that I am aware of that Mr.  
14 Burns knew of a single one of those stoning incidents.

15 MR. HERBERT: On the basis of all the evidence  
16 it would be up to the jury or not whether or not Mr. Burns  
17 should have foreseen what the evidence is charged with.

18 THE COURT: What evidence is there to put him on  
19 notice?

20 MR. HERBERT: What evidence is there in this case  
21 that the railroad could have foreseen that an armed criminal  
22 would shoot at a person.

23 THE COURT: The only evidence is the stonings.  
24 You say it is insufficient, and I'm not sure it is sufficient.  
25 I think the Court of Appeals may well agree with you that it is

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2 not sufficient, assuming the jury doesn't. That is the only  
3 evidence I see. That is what I'm going to charge the jury.  
4 Having charged the jury that, I don't see how I can charge  
5 them that Mr. Burns should have foreseen it because there is  
6 not a scintilla of evidence that he ever heard of any one  
7 of those stonings.

8 MR. HERBERT: Not a scintilla of evidence that  
9 there was any prior shootings either, your Honor.

10 THE COURT: The jury is going to know that. The  
11 only issue I see in this case is whether the stonings put  
12 the railroad on the kind of notice that they should have  
13 foreseen this danger.

14 MR. HERBERT: This danger being what, your Honor?

15 THE COURT: The shooting. You know what the danger  
16 is. If I were a juror I'd throw the case out, but that is  
17 neither here nor there. The Court of Appeals may well throw  
18 it out but that is neither here nor there. The issue I am  
19 submitting to the jury, as I understand the contentions, is  
20 the railroad was on notice because of the stonings.

21 Now, I agree that is a narrow issue.

22 MR. HERBERT: Is the Court now going to make a  
23 ruling with respect to the defendant's claim of contributory  
24 negligence?

25 THE COURT: I'm ruling unless you put evidence of

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2 that there is no contributory negligence.

3 MR. HERBERT: I haven't put in my evidence.

4 THE COURT: If you put in evidence my ruling will  
5 be different. I am telling you what I now see as the  
6 situation in the case.

7 You may put in a statement by Mr. Burns to the  
8 effect that he had been worried about this for ten years.  
9 That would be a radical change, in my view. But on the basis  
10 of the present evidence -- I'm not making a ruling because  
11 it is not appropriate for a ruling. I'm just indicating I  
12 don't see any evidence of contributory negligence thus far  
13 in the case.

14 Now, am I correctly stating your position?

15 MR. ELKIND: Your Honor, what I am about to say may  
16 come as a little bit of a shock but I'm rather certain if there  
17 is a verdict there will be an appeal to the Court of Appeals  
18 and I would prefer to defend on the record in which your  
19 Honor did charge on comparative negligence.

20 THE COURT: I'm not going to charge it because you  
21 would prefer to defend it.

22 MR. ELKIND: You asked me what my position is and  
23 I'm telling you.

24 THE COURT: What is your position on your case?  
25 Have I correctly stated your case, that what you contend put

2 the railroad on notice that it should change this 30 year  
3 practice was the stonings?

4 MR. ELKIND: Yes. I would also add to that that  
5 the practice has been dangerous for 30 years, and the fact it  
6 continued on for 30 years without any evidence of this kind  
7 of injury doesn't insulate it from a jury's passing on the  
8 issue.

9 THE COURT: If you contend the practice has been  
10 dangerous for 30 years, I will leave it to the jury whether  
11 there is any reason they think that he should have known it  
12 as well as everybody else.

13 MR. ELKIND: That is where the other issue comes  
14 in.

15 THE COURT: What evidence is there that it has  
16 been dangerous for 30 years? How could you possibly support  
17 a verdict on the theory it has been dangerous for 30 years,  
18 when it had been going on for 30 years without anything?

19 MR. ELKIND: There is no contention by the defen-  
20 dant that there has been no injury on the train platform.  
21 There is no evidence either way so that the jury, as I under-  
22 stand the FELA, the jury is entitled to apply their judgment  
23 on the issue of whether or not it was a safe practice. There  
24 doesn't have to be evidence. Common sense would tell them.

25 THE COURT: Common sense would tell them that

1 rd/1f/14

2                   **173A**

3 something which has been going on for 30 years is dangerous?

4                   MR. ELKIND: It might very well. We assume risks,  
5 unnecessary risks all the time in our life.

6                   THE COURT: I will consider it. If I submit that  
7 I will submit contributory negligence.

8                   MR. HERBERT: Assumption of risks is no part of this  
9 lawsuit. I have not raised it as a defense.

10                  THE COURT: You have not raised it.

11                  Are you ready to proceed?

12                  MR. HERBERT: I'm sorry, your Honor?

13                  THE COURT: Ready to proceed?

14                  MR. HERBERT: All right.

15                  (Jury Present)

16                  THE COURT: Good afternoon, ladies and gentlemen.

17                  Proceed, Mr. Herbert.

18                  MR. HERBERT: Thank you, your Honor. I would  
19 like to call to the stand Mr. Brown.

20                  JOHN J. BROWN, called as a witness on  
21 behalf of the defendant, having been first duly  
22 sworn, was examined and testified as follows:

23                  DIRECT EXAMINATION

24                  BY MR. HERBERT:

25                  Q      Mr. Brown, by whom are you employed?

                A      Penn Central Railroad.

1 rd/lf/15

2 Q How long have you been employed by the railroad,  
3 sir?

4 A 33 years.

5 Q In what capacity?

6 A Fireman and an engineer.

7 Q When you say engineer, what does that mean, Mr.  
8 Brown?

9 A Operating of M.U. equipment, locomotives, diesels,  
10 any equipment they have.

11 Q And on March 15, 1969, were you the engineer or  
12 the engine man who was operating this two-car train from  
13 Croton to Grand Central terminal upon which Mr. Burns and  
14 Mr. McGeoch were?

15 A Yes, I was.

16 Q Have you made this run between Grand Central and  
17 Croton-Harmon on any occasions prior to the date of this  
18 occurrence?

19 A Yes.

20 Q Did you have or did you work off the extra list or  
21 do you have a regular job?

22 A I worked off the extra list.

23 Q And did you have this same run between those  
24 terminals prior to this date?

25 A I did.

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1 rd/lf/16

2 Q With what degree of frequency each week would you  
3 make these runs from -- let's just say past the area of 125th,  
4 126th Street?

5 A On the average, 30, 38 times a week.

6 Q 30 how many?

7 A Between 30 and 38 times a week.

8 Q Between 30 and 38 times a week?

9 A Yes.

10 Q Now, this is what we call M.U. equipment?

11 A That's correct.

12 Q Multiple unit equipment?

13 A Yes.

14 Q Does this equipment have a vestibule at either  
15 end?

16 A It does.

17 Q And from where do you operate the train?

18 A All my work is performed in a vestibule on the head  
19 end of the train.

20 Q In other words, you have to operate the controls and  
21 to do that you are in the vestibule at the head end of the  
22 train?

23 A Yes.

24 Q When you perform this job of operating the train,  
25 do you sit or stand?

1 rd/lf/17

Brown-Direct

2 A As a rule I stand.

3 Q Now, from which side of the vestibule do you  
4 operate the train?

5 A On the right-hand side.

6 Q The right-hand side, would that be the west side  
7 of the train when you are coming southbound?

8 A That's correct.

9 Q And that would be the same side of the train that  
10 doors would have been opened to receive and discharge  
11 passengers at 125th Street?

12 A That's correct.

13 Q And from where you stand to operate this, what is  
14 immediately to your right?

15 A Vestibule side door.

16 Q And is there a window in that door?

17 A There is.

18 Q And as you stand operating the train, where  
19 does that window come to you?

20 A About chest high.

21 Q And how far are you from the side of that window?

22 A From six to eight inches.

23 Q Do you operate or have you ever operated that train  
24 with the window open?

25 A Yes.

1 rd/lf/18

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2 Q With what degree of frequency?

3 A Usually from the late fall -- late spring to the  
4 early fall, when the weather is humid.

5 Q And when I asked you before about the number of  
6 times that you operate during the week, 30 times, would  
7 that be past the area of 125th-130th Street?

8 A Yes, it would.

9 Q And it would be all the way through on the elevated  
10 trackage?

11 A Right.

12 Q How many years prior to March, 1969, had you been  
13 performing that type of work through this area?

14 A I'd say five years.

15 Q Five years before?

16 A Yes.

17 Q And during those five years before had you ever  
18 been stoned in the area?

19 A Not --

20 MR. ELKIND: Your Honor, please, I object. I  
21 don't believe that has any probative value. We know how many  
22 stonings there are. Whether this man experienced any or not  
23 doesn't seem to me to make any difference. Totally irrelevant.

24 THE COURT: I don't see it does any harm either.

25 MR. HERBERT: I'm sorry, I didn't hear your answer.

2 A Repeat the question.

3 Q My question was: during the period of time that  
4 you have been operating as an engine man through this area,  
5 have you ever been stoned as you passed through this area?

6 A No.

7 Q Have you ever been fired upon as you passed through  
8 this area?

9 A No.

10 Q Now, it has been called to our attention in this  
11 lawsuit that prior to March 15, 1969, and the ten months  
12 prior thereto, there had been eight reported instances of  
13 stonings of trains on the elevated package. You were in  
14 the courtroom when you heard that testimony read by the judge.

15 A Yes, I was.

16 Q On the basis of your experience of performing  
17 all your duties in the vestibule of the train when you passed  
18 through this area, and disregarding what you have heard  
19 about the stonings that have been introduced into evidence,  
20 did you consider it a danger to you to perform your duties  
21 in the vestibule of a train?

22 A No.

23 MR. ELKIND: Objection to the form of the question.

24 THE COURT: I'll allow it.

25 A No.

2 THE COURT: He said no.

3 Q Does the fact that you have now learned that there  
4 were four -- I'm sorry, eight stoning incidents in which one  
5 person was reported to have been injured and three windows  
6 reported to have been broken change your opinion with respect  
7 to the hazards that may be involved in operating -- performing  
8 your duties in the vestibule?

9 MR. ELKIND: Objection, your Honor.

10 THE COURT: Hold your answer a minute.

11 What is your objection?

12 MR. ELKIND: That is the question that the jury  
13 is to pass on.

14 THE COURT: Of course it is a question the jury is  
15 supposed to pass on. But this man seems to have some qualifi-  
16 cations as an expert I would say.

17 MR. ELKIND: How is he an expert? He is an engine  
18 man working for the defendant?

19 THE COURT: He has had more experience --

20 MR. ELKIND: I press my objection.

21 THE COURT: I'll allow it.

22 Ladies and gentlemen, this is kind of quasi expert  
23 testimony. The theory of expert testimony is that there are  
24 some fields of life where your general experience is less than  
25 the experience of someone else who has had a good deal of

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2 experience, and this man has been doing this kind of work  
3 and he can express an opinion but that doesn't in any way bind  
4 you at all. It is just for whatever you think it is worth.  
5 This fellow says he has been doing it for five years and he  
6 is entitled to express an opinion. The mere fact he expresses  
7 an opinion is not binding on you in any way, shape or  
8 form. You can take it into account or you can disregard it.

9 Q What is your answer, Mr. Brown?

10 A No.

11 Q I don't recall if I asked you this, but have you  
12 ever been fired upon by any weapons while passing through this  
13 area?

14 A No.

15 MR. HERBERT: Thank you.

16 MR. ELKIND: I have no questions of Mr. Brown.

17 THE COURT: You may step down.

18 (Witness Excused)

19 MR. HERBERT: May I have one moment, your Honor?

20 THE COURT: Surely. Is the moment long enough  
21 to warrant sending the jury out or not?

22 MR. HERBERT: I'll tell you in a second.

23 (Pause)

24 MR. HERBERT: No, your Honor, I can proceed now.

25 I would like to call Mr. Larry Forbes, please.

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2 L A W R E N C E J. F O R B E S, called as a witness  
3 on behalf of the defendant, having been first duly  
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. HERBERT:

7 Q Mr. Forbes, by whom are you employed?

8 A The Penn Central Railroad.

9 Q How long have you been employed by the Penn Central  
10 Railroad, Mr. Forbes?

11 A 21 years.

12 Q Were you employed by the railroad on March 15,  
13 1969?

14 A Yes, sir, I was.

15 Q And what was your job with the railroad at that  
16 time, Mr. Forbes?

17 A Suburban train master, Hudson and Harlem Division.

18 Q And as suburban train master, did you have super-  
19 vision over other employees in other departments?

20 A Yes, sir, all train and engine service, block  
21 operators, train dispatchers, and any other employees in-  
22 volved in the transportation department as it pertained to the  
23 suburban service.

24 THE COURT: Everything seems clear to me except  
25 block operators.

2 THE WITNESS: Those are the people who operate the  
3 switches and the signals in the station area buildings.

4 Q You would then have general supervision over train-  
5 men in train service?

6 A Yes, sir, I did.

7 Q That would be in passenger service?

8 A Yes, sir.

9 Q Are there different types of employees in train  
10 service, different titles of the jobs they hold?

11 A Yes, sir. There is conductors, engine men,  
12 assistant conductors, assistant conductor-brakeman, brakeman,  
13 fireman, and flagman.

14 Q Now, you have been present during the taking of  
15 some testimony in this lawsuit, have you not, Mr. Forbes?

16 A Yes, sir.

17 Q You know that on March 15, 1969, Mr. Burns was  
18 performing duties as a brakeman on the train he was operating  
19 between Croton-Harmon and New York City?

20 A Yes, sir, I do.

21 Q Can you tell me, Mr. Forbes, what are the duties  
22 of a brakeman?

23 A On a passenger train a brakeman's duties include  
24 the opening and closing of traps, the proper positioning of  
25 the markers on the train, answering passengers' questions,

1 rd/lf/24

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2 counting the total amount of passengers in the train,  
3 and also the protection of the people on the train as far as  
4 getting on or off moving equipment at a station or approaching  
5 a station.

6 Q With respect to handling of traps on trains, Mr.  
7 Forbes, are there any rules or regulations that the railroad  
8 has with respect to the handling of those traps?

9 A Yes, sir, there is.

10 Q And what do those rules provide?

11 A Basically the rule provides for the opening of  
12 traps on passenger equipment --

13 MR. ELKIND: Excuse me, is the rule in writing?

14 Q Is the rule in writing?

15 A Yes, sir, it is.

16 Q Do you know the number of the rule?

17 A 1457-A, I believe.

18 Q Is that of the rules for conducting transportation?

19 A Yes, sir, the Penn Central rules for conducting  
20 transportation.

21 MR. HERBERT: May I have this marked for identi-  
22 fication?

23 (Defendant's Exhibit A marked for identification.)

24 THE COURT: You want to show the appropriate rule  
25 to counsel.

1 rd/lf/25

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2 MR. ELKIND: I have seen it.

3 Q I will give you a copy of the rule book in which  
4 this rule is contained, Mr. Forbes. The rule is in that book,  
5 isn't it?

6 A That's right.

7 Q What are the duties of a trainman with respect  
8 to the rule contained in the book?

9 THE COURT: Why don't you have him read the rule  
10 first and ask him to explain it if you want.

11 Q Would you be good enough, Mr. Forbes, to read  
12 the rule and explain it to us if necessary.

13 A Yes, sir. The rule is entitled "Folding Steps,  
14 Side and Trap Doors."

15 "Passenger cars equipped with folding steps, side  
16 and trap doors must not be permitted to leave a terminal origina-  
17 ting point with side or trap door missing. If either becomes  
18 defective enroute it must be closed and secured until car  
19 reaches destination. Side and trap doors on passenger cars  
20 in service or moving dead head on trains must be kept closed  
21 except on trains making frequent stops, side and trap doors  
22 on platform side may be left open between stations."

23 Q What does that mean, Mr. Forbes?

24 A That would mean, for example, a train that was  
25 running express from Tarrytown, for example, to Grand Central

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Forbes-Direct

2 or to 125th Street, that the trainman would be required by  
3 the rule to close the door upon leaving Tarrytown station  
4 If it were a peak hour commuter train and the train's next  
5 stop should happen to be Irvington, because of the close  
6 proximity to the station the trainman would not be required  
7 to close the trap.

8 Q Thank you.

9 A "When practicable they must be closed when approach-  
10 ing or passing through tunnels, over bridges and trestles" --

11 Q When you say bridges, would that include the  
12 bridge at 138th Street which spans the Harlem River?

13 A Yes, sir, it would.

14 Q Thank you.

15 A "Side and trap doors must be closed before  
16 arriving at stations with high platforms. In the open or  
17 closed position side and trap doors must be latched securely.  
18 Employees in the discharge of their duties may open side  
19 and trap doors and at stations the doors may be opened only  
20 on platform side. Employees who in the performance of their  
21 duties open side and trap doors on sleeping cars must also  
22 close same."

23 MR. ELKIND: Excuse me, Mr. Forbes, before you  
24 read the next paragraph, may we approach the side bench?  
25

THE COURT: Yes.

1 rd/lf/27

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2 (At the side bar)

3 MR. ELKIND: Your Honor, please, this next  
4 paragraph refers to folding steps. Now, I don't think this  
5 is a folding step and I don't see any point in reading it  
6 if it is not. Is this a folding step? This is not a folding  
7 step.

8 MR. HERBERT: Your Honor, that rule allows the  
9 opening of trap doors when the train is in motion, unless  
10 you are dealing with folding steps, then you cannot do it while  
11 the train is in motion because you wouldn't clear the platform.

12 THE COURT: Let's leave that out.

13 MR. HERBERT: It allows for the opening of trap  
14 doors before a train arrives at a station, when a train is  
15 in motion, unless, of course, it is a train that has folding  
16 steps, in which case it is prohibited.

17 THE COURT: I see your point. It is a negative  
18 pregnant.

19 MR. HERBERT: The practice has already been  
20 stipulated to of opening trap doors.

21 MR. ELKIND: Why read anything about folding steps?  
22 It opens up a whole new tangential issue.

23 THE COURT: I can't see that it is prejudicial. It  
24 is up to you if you want to read it for the purpose you  
25 state. It is up to you.

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2 MR. HERBERT: I am entitled to have him explain to  
3 us, to the jury, that you may open trap doors on trains that  
4 do not have folding steps while the train is in motion.

5 THE COURT: All right.

6 (In Open Court)

7 Q Mr. Forbes, you may continue, please.

8 A "Folding steps which operate in conjunction with  
9 vestibule trap doors on passenger cars are not within the  
10 established clearance limits unless in fully closed position  
11 or fully opened position. Vestibule traps of cars equipped  
12 with folding steps must not be opened or closed while cars are  
13 in motion."

14 Q Now, will you explain that to us, Mr. Forbes,  
15 what that means?

16 THE COURT: In the first place you didn't have a  
17 folding step in this case, did you?

18 THE WITNESS: No, sir, your Honor.

19 Certain types of railroad passenger cars have  
20 steps which, when you open the trap door, swing out. And  
21 while in motion would foul the adjacent track. This particular  
22 train was not equipped with that equipment.

23 Q And it is those cars with folding steps that you  
24 are not allowed to open the trap doors while the train is  
25 in motion?

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2 A That's correct.

3 THE COURT: So the negative inference is that if  
4 you haven't a folding step you may open the trap door?

5 THE WITNESS: Yes, sir, your Honor.

6 Q What else does the rule provide, Mr. Forbes?

7 A "Employees must be on the alert at all times,  
8 particularly at stations, to take necessary action in the  
9 event passengers attempt to board or leave moving trains."

10 Q What does that require employees to do?

11 A That requires them to do exactly what it says,  
12 to position themselves to their best possible advantage to  
13 permit people from either try -- to prohibit people rather  
14 from either trying to jump off the train before it comes to a  
15 complete stop or from other people trying to climb on before  
16 it made its complete stop.17 Q Do employees in the performance of their duties,  
18 are they required to announce which particular exit is to  
19 be used?

20 A Yes, sir, they are.

21 Q And are they required to so instruct the  
22 passengers that they are to use a particular exit or entrance?23 A Yes, sir. Not so much the entrance as exit. They  
24 don't really have that much opportunity to inform them which  
25 way to enter, but they do on the exit.

1 rd/1f/30

Forbes-Direct

2 THE COURT: I guess entering the passenger sees  
3 where the door is open and comes to it. But exiting he  
4 doesn't know which door is open unless somebody tells him?

5 THE WITNESS: That's right.

6 Q Have there been occasions in your experience, Mr.  
7 Forbes, when passengers may attempt to open a trap door them-  
8 selves?

9 A Yes, sir.

10 Q Now, Mr. Forbes, while you were a train master at  
11 Grand Central terminal back in 1969, did you have occasion  
12 to have any dealings with Mr. Loconto?

13 A Yes, sir, many.

14 Q And who is Mr. Loconto?

15 A At that time he was the local chairman for the  
16 brotherhood of railway trainmen

17 Did Mr. Loconto ever call to your attention  
18 any particular unsafe practices which he in his mind thought  
19 should be called to the attention of management?

20 A I couldn't be specific as to whether or not Mr.  
21 Loconto did, but in my capacity at the time I dealt with  
22 several local chairmen and many of them had. I would assume  
23 that Mr. Loconto also had.

24 Q And would you sit down and discuss with them any  
25 particular problem that they had or any particular hazard

1 rd/lf/31

Forbes-Direct

2 that they might feel was interfering with the safe work of  
3 the employees?

4 — A Yes, sir.

5 Q And following those conferences would you sometimes  
6 recommend to management that they follow up on these suggestions  
7 made by these men?

8 A If I felt that they were substantial either  
9 complaints or bonafide suggestions, I certainly would.

10 Q Did Mr. Loconto ever suggest to you that the  
11 practice of opening trap doors as trains were arriving at the  
12 stations be changed because they represented a hazard to  
13 employees, as the trains were approaching stations, the 125th  
14 Street station?

15 A No, sir.

16 THE COURT: Did anyone else request you to do that?

17 THE WITNESS: No, sir. The reason I hesitated.

18 Several of the local chairmen had complained that the springs  
19 on the trap doors were springing too fast. So one of the  
20 things that we did on that complaint was to have small little  
21 signs to be made in the shape of a hand --

22 THE COURT: That isn't relevant. Strike it.

23 Just because a judge asks a question it doesn't  
24 mean that the question is proper. It hasn't anything to do  
25 with the case anyway.

1 rd/1f/32                   Forbes-Direct

2                   Q     Mr. Forbes, at my request did you review for me  
3 certain train dispatchers' sheets for the dates of March 10th  
4 to March 15th? That would be seven days, a Sunday through  
5 Saturday, 1969.

6                   A     March 9th through March 15th, yes, sir.

7                   Q     And do you have these here with you in court today?

8                   A     Yes, sir.

9                   Q     And do those --

10                  MR. ELKIND: If your Honor please, the pretrial  
11 order makes no reference to these documents. This is the  
12 first I know anything about it.

13                  THE COURT: I'm sure the pretrial order says about  
14 other documents that they deem relevant.

15                  MR. ELKIND: I don't think so.

16                  Is there anything in the pretrial order about  
17 this or in the pretrial notice? Did you ever show these to  
18 me, these documents that you propose to use now?

19                  MR. HERBERT: Yes. As a matter of fact, in July  
20 of this year when we finished up the pretrial memorandum I  
21 told you the exhibits would be available for you anytime you  
22 wished. You did send over your assistant here, Ben -- I  
23 know it is Ben -- Mr. Wasserman --

24                  MR. ELKIND: It has to do with the decedent's work  
25 sheets up in Harlem.

1 rd/lf/33

Forbes-Direct

2 MR. HERBERT: That is what you asked me to do.

3 MR. ELKIND: I asked you specifically whether you  
4 showed me these documents you intend to use here.5 THE COURT: If you are going to have a discussion  
6 come to the side bar.

7 (At the side bar)

8 MR. ELKIND: These are the exhibits that were  
9 listed (handing).10 MR. HERBERT: I would call to the Court's attention  
11 that I listed as exhibits the dispatchers' records of  
12 movements of trains from March of 1969.

13 THE COURT: Is that what this is?

14 MR. HERBERT: All right.

15 MR. ELKIND: These are the dispatchers' records?

16 MR. HERBERT: Yes.

17 THE COURT: What is the purpose of this offering?

18 MR. HERBERT: The offer will be to show the  
19 number of trains by actual count that passed through this  
20 area in the average week, the number of cars by actual count  
21 that moved past this area in the average week.22 THE COURT: That is to indicate what you consider  
23 the insignificance of these stonings?

24 MR. HERBERT: Yes.

25 THE COURT: Allowed.

1 rd/1f/34

Forbes-Direct

2 MR. ELKIND: Why don't you put in the number  
3 instead of putting in the sheets.

4 MR. HERPERT: I can do that.

5 (In Open Court)

6 Q Mr. Forbes, you have had an opportunity at my  
7 request to review these train dispatcher sheets?

8 A Yes, sir.

9 C Showing the movement of trains past the area of  
10 Grand Central terminal north across the bridge?

11 A Yes, sir.

12 Q And did you make a total compilation on the  
13 basis of actual count for the seven days of March 9th through  
14 and including March 15th?

15 A Yes, sir.

16 Q And can you tell me how many trains passed that  
17 area that week?

18 A 2,859.

19 Q And how many cars moved past that area during that  
20 week?

21 A 14,925.

22 Q And is that fairly representative of the  
23 number of cars that have moved past that area in an average  
24 week prior to this occurrence?

25 A Yes, sir.

1 rd/lf/35                   Forbes-Direct

2                   Q     Now, as suburban train master are you familiar  
3     with the number of passengers that are carried on -- have  
4     been carried in and out of Grand Central terminal on this  
5     trackage in an average day, average weekday?

6                   A     Yes, sir.

7                   Q     And how many on an average weekday are carried  
8     past this area?

9                   A     In the suburban service 145,963.

10                  THE COURT: A week?

11                  THE WITNESS: A day, sir.

12                  Q     A day?

13                  A     Yes, sir.

14                  Q     And so that for a five-day week that would be  
15     five times that figure?

16                  A     Yes, sir.

17                  Q     And does that include long distance trains?

18                  A     No, sir, it does not.

19                  Q     This is the commuter service?

20                  A     Yes, sir.

21                  Q     You said that on an average weekday 145,000 would  
22     pass this area. Would that be true on the weekend?

23                  A     No, sir.

24                  Q     It would be a lesser figure or greater figure?

25                  A     Lesser.

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1 rd/1f/36

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2 Q Do you know the number of persons that would be  
3 carried past that area on a weekend, such as a Saturday or  
4 a Sunday?

5 A Approximately 20 percent of that.

6 Q Twenty percent of 145,000?

7 A Yes, sir.

8 MR. HERBERT: I would like to speak with Mr.  
9 Elkind first, your Honor.

10 THE COURT: Certainly.

11 (Pause)

12 MR. HERBERT: Just another moment, if your  
13 Honor please. I am sorry for the delay.

14 (Pause)

15 MR. HERBERT: Thank you, Mr. Forbes, that is all I  
16 have.

17 CROSS EXAMINATION

18 BY MR. ELKIND:

19 Q Mr. Forbes, as the suburban train master do you  
20 have anything to do with the changes or with changing the  
21 book of rules or with the language that appears in the rules?

22 A No, sir. Only by recommendations.

23 Q I see. And supposing you wanted to make a change  
24 in your rules, who would you make your recommendation to?

25 A At that time to the transportation superintendent.

2 Q And was his office in Grand Central station?

3 A No, sir. His office was in 466 Lexington Avenue,  
4 adjacent to mine.

5 Q Is that where your office was?

6 A Yes, sir.

7 Q I thought I heard Mr. Herbert suggest that your  
8 office was at Grand Central station.

9 A No, sir, it was not.

10 Q At 466 Lexington?

11 A Yes.

12 THE COURT: Where is that streetwise?

13 THE WITNESS: Between 45th and 46th Street.

14 THE COURT: Pretty close to Grand Central?

15 THE WITNESS: Yes.

16 Q And would the superintendent of transportation  
17 then consider whether or not to make a change in the rules?

18 A No, sir. He would consider the value of the  
19 recommendation and further it to, should he feel it applicable,  
20 further it to the Penn Central rules committee for further  
21 examination.

22 Q Now, where at that time was the Penn Central rules  
23 committee?

24 A They were in Philadelphia, to the best of my  
25 knowledge.

2 Q Did you ever appear before that committee?

3 A Not in the position of suburban train master, no.

4 Q Well, how many men compose the rules committee in  
5 Philadelphia?

6 A At that time I think there were two from each  
7 region of the Penn Central Railroad. I wouldn't swear to  
8 that.

9 Q How many regions are there in the Penn Central  
10 Railroad?

11 A There were at that time, I think eight.

12 Q How often would this rules committee meet?

13 A I wouldn't have that knowledge.

14 Q And until the rules committee met and passed  
15 on the rule, the rules remain unchanged, is that correct?

16 A As far as the rules went, yes.

17 THE COURT: But you could issue bulletins to change  
18 them?

19 THE WITNESS: No, sir. The Penn Central's  
20 employees' timetable contains special instructions, whose  
21 numbers correspond to the rules for conducting transportation.  
22 Should any division want to supplement, add to or delete  
23 or explain a specific rule on his territory, it would then be  
24 included in the employees' timetable and not the book of rules.

25 Q Let's stay with the book of rules. Did you have

1 rd/lf/39

2 the authority or could you have made a suggestion or written  
3 a letter directly to the rules committee or would you have to  
4 go through the superintendent of transportation?

5 A I would imagine I could do it myself, but protocol  
6 would demand I went through my immediate superior.

7 Q Now, is your office set up to receive information  
8 regarding material that might be needed for determining  
9 whether or not there should be rule changes? Is that one of  
10 your functions or do you have a department?

11 A Do I have a department?

12 Q Yes.

13 A No, sir.

14 Q The Penn Central has a police department, is that  
15 correct?

16 A Yes, sir.

17 Q And how many men are in that police department  
18 in the area between Grand Central station and, say, Croton  
19 and White Plains?

20 A I wouldn't have the faintest idea.

21 Q Are they under your supervision?

22 A No, sir.

23 Q Under whose supervision is the police department?

24 A Police department has their own chain of command.

25 They would come directly under the superintendent of police,

1 rd/lf/40

Forbes-Cross

2 the captains, lieutenants.

3 Q Is there a chief of the Penn Central police?

4 A I don't think there was at that time. They call  
5 the title superintendent of police.6 Q Superintendent of police. Where was the Superintendent  
7 of police's office?

8 A At that time it was on the same floor as my own.

9 Q On the same floor?

10 A Yes, sir.

11 Q Did you know the man who was the superintendent  
12 of the police by name?

13 A By sight, by name.

14 Q Do you and he ever have any business dealings  
15 with one another?

16 A No, sir.

17 Q Do you know whether or not in the normal course  
18 of running that police department the police would receive  
19 the information with respect to stonings along the right-of-way  
20 of the railroad?21 A Ninety-nine percent of the time they would get it  
22 from the Penn Central chief dispatcher's office.

23 Q From the chief dispatcher's office?

24 A Yes, sir.

25 Q He would give the information to the police

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2 department?

3 A Yes, sir.

4 Q Right?

5 A Yes, sir.

6 Q It would then go into the police department file  
7 as a record, is that correct?

8 A Yes, sir.

9 Q Was a copy of that record made available to you?

10 A Not as a train master, no, sir.

11 Q Well, were summaries or statistical summaries given  
12 to you at any time?

13 A No, sir.

14 Q Do you know whether or not they were furnished to  
15 the superintendent of transportation?

16 A To the best of my knowledge they were furnished to  
17 the division superintendent and general superintendent.

18 Q Now, who is the division superintendent and who is  
19 the general superintendent and what are their jobs?

20 A Suburban train master, I reported to the transporta-  
21 tion superintendent. The transportation superintendent in turn  
22 reported to the division superintendent who in turn reported  
23 to the general superintendent. It is like the Army, sir. One  
24 is a sergeant and one is a lieutenant, until you get to the  
25 general.

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2 THE COURT: What would be your rank in the Army  
3 category?

4 THE WITNESS: As a train master equivalent to a  
5 sergeant.

6 THE COURT: You have a long way to go before you  
7 get to the general.

8 THE WITNESS: Yes, sir.

9 Q So in any event you as the train master were not  
10 furnished any information by the police department or by  
11 the dispatcher with respect to stonings?

12 A Oh, yes, sir, I was. Not by the police department  
13 but as suburban train master I was in direct charge of the  
14 chief dispatcher's office.

15 Q Who was in the chief dispatcher's office in March  
16 of 1969, who was the man in charge of that?

17 A By name?

18 Q Is there more than one individual?

19 A Well, at that time I was in charge of the office  
20 but not present.

21 THE COURT: I didn't quite get that answer.

22 THE WITNESS: I was the one responsible for the  
23 operation of the office but I was not present in the office.

24 THE COURT: I see.

25 Q Where is the chief dispatcher's office?

2 A On the fourth floor of 466 Lexington Avenue.

3 Q Where is your office?

4 A Right next to it.

5 Q Was there an individual who was the chief dispatcher?

6 A Yes, sir.

7 Q In March of 1969?

8 A Yes, sir.

9 Q What was his name?

10 A I think it was John Cannon, C-A-N-N-O-N.

11 Q Now, would John Cannon be one of your corporals?

12 A Yes, sir.

13 Q He was a corporal?

14 A Yes, sir.

15 Q Now, did John Cannon receive the reports of the  
16 stonings?

17 A Of all those stonings that you referred to?

18 THE COURT: That are in evidence. Do you know?

19 THE WITNESS: My memory isn't that good, your  
20 Honor. I would say the vast majority of them. Eight, seven.

21 THE COURT: You don't remember specific things,  
22 but are you telling us in the normal course you would have  
23 gotten?

24 THE WITNESS: Yes, sir.

25 Q That is all you can answer is in the normal course of

2 events. In the normal course of the operation the information  
3 with respect to stonings would go to your corporal?

4 A Yes, sir.

5 Q Did he in turn present that information to you?

6 A Yes, sir.

7 C And did you in turn present that information at  
8 some time to your superior?

9 A If I felt it warranted, yes.

10 Q Did you, did you?

11 A I couldn't answer that. I don't remember.

12 Q Do you recall any meetings prior to March of 1969  
13 in which you and the chief dispatcher discussed the question  
14 of stonings?

15 MR. HERBERT: Are we speaking of a particular area,  
16 Mr. Elkind, or are you speaking of just stonings in general?

17 MR. ELKIND: Well, I would want to know if he  
18 doesn't discuss stonings at all, then there is no point in  
19 my asking anything more about it.

20 THE COURT: Do you remember now as you sit here  
21 ever talking about stonings to your chief dispatcher?

22 THE WITNESS: Yes.

23 THE COURT: You do?

24 THE WITNESS: Yes.

25 Q Before March of 1969?

2 A Yes, sir.

3 Q And did that include the area -- the stonings we  
4 have been discussing in this courtroom?

5 A No.

6 Q All right.

7 You were here in the courtroom when the records  
8 or when the admissions from the records of the Penn Central  
9 were read to the jury by his Honor?

10 A I was here, yes.

11 Q Prior to hearing it in the courtroom, did you  
12 know about those specific stonings?

13 A I couldn't hear the judge read them.

14 Q Well, they were stonings that occurred on the  
15 following dates: May 17, '68; June 10, '68; June 11, '68;  
16 September 2, '68; September 19, in '68; October 14, in '68;  
17 and January 20 in '69, and the locations were all between  
18 130th Street and 102nd Street.

19 THE COURT: That is what you would have heard if  
20 you had been close enough.

21 Q That is what you would have heard.

22 Had you heard about those particular stonings  
23 before coming to court here?

24 A In all honesty I would say I can't remember except  
25 that in the normal course of business I would have heard them,

2 yes. Since any report that went out of the chief dispatcher's  
3 office also passed through my hands I would have to say yes on  
4 that basis. But to remember specific incidents, I can't do  
5 that.

6 Q Did you, yourself, ever work in passenger service  
7 as a trainman?

8 A No, sir.

9 THE COURT: What did you do when you were a private?

10 THE WITNESS: I did many things. I was assistant  
11 train master, train dispatcher, assistant chief dispatcher,  
12 block operator, baggage man, freight trucker.

13 THE COURT: But you didn't operate on trains?

14 THE WITNESS: No, sir.

15 Q I note in Rule 4157-A that you read in response to  
16 Mr. Herbert's question, that rule says that when practicable,  
17 they, meaning the side and trap doors, must be closed when  
18 approaching and passing through tunnels, over bridges and  
19 trestles. Do you know what the purpose of that particular re-  
20 quirement is?

21 A I think the purpose is stated. So that anyone who  
22 should happen to be passing through a vestibule or standing  
23 there would be protected from injury.

24 When you go over a bridge on railroad property,  
25 if it is a movable bridge, in other words if it opens or

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2 swings, there is a point where the rails separate and at times  
3 you can get a slight motion in the train passing over this  
4 point.

5 THE COURT: So a passenger walking through, if  
6 the door was open and it happened to hit that point, would  
7 be in danger of being --

8 THE WITNESS: I wouldn't want to say of being  
9 in danger.

10 THE COURT: It might happen that he would lose  
11 his balance?

12 THE WITNESS: Could be.

13 THE COURT: That is why the door should be closed,  
14 is that what you are telling us?

15 THE WITNESS: Yes, sir. As far as I know it is  
16 also a regulation of the Interstate Commerce Commission but  
17 I wouldn't swear to that.

18 MR. ELKIND: I move to strike out the last observa-  
19 tion by the witness, your Honor.

20 THE COURT: Well, it is immaterial. I don't see  
21 that it does any good or harm. He said as far as he knows  
22 that is part of the I.C.C. regulations.

23 MR. ELKIND: He doesn't know. So I think it ought  
24 to be stricken.

25 THE COURT: All right, it is stricken.

2 Q According to this rule, 4-57-A, it states that,  
3 "Employees in the discharge of their duties may open side  
4 and trap doors and at stations the doors may be opened only  
5 on platform side."

6 What do you interpret that sentence to mean?

7 A For example at 125th Street if the train were on  
8 track two, as this particular train was, the platform side  
9 would be on the west side, and this would restrict the train  
10 crew or conductor from opening the side or trap doors on the  
11 east side of the train.

12 Q Well, it says, "Employees in the discharge of  
13 their duties may open side and trap doors." It doesn't tell  
14 them when to open them, does it?

15 A Not specifically.

16 Q It just says where to open it, it doesn't say when  
17 to open it.

18 A Not specifically in the rule. However, the follow-  
19 ing portion of the rule clarifies that in my mind. Penn  
20 Central's interpretation of the rule.

21 Q The following sentence is, "Employees who in the  
22 performance of their duties who open" --

23 A Excuse me, the continuance of the sentence. "In  
24 that station doors may only be opened on the platform side."

25 Q It does make it clear, I would say, that the doors

2 are only to be opened on the platform side. But what seems to  
3 me to be unclear to anyone reading it is to know what this  
4 rule tells an employee about --

5 MR. HERBERT: I object to him reading. It may be  
6 unclear to Mr. Elkind.

7 THE COURT: Overruled.

8 The point he is making is it doesn't tell the  
9 trainman how soon before the station to open the door.

10 Is that the point you are making?

11 MR. ELKIND: Yes.

12 THE COURT: That is the point you are making.

13 You are asking him the question and that is obvious from the  
14 rule.

15 Q Under the interpretation of that rule what is the  
16 employee to do with respect to when he can open or when he  
17 should open the side and trap doors?

18 A Well, we operate many trains where the train service  
19 personnel is as numerous as the trap doors. Therefore,  
20 they must be opened on approaching the station. In other  
21 words, a seven-car train has a trap at either end of each  
22 car, there are fourteen traps. Eliminating the one that  
23 the engineer is operating one and the one on the rear end,  
24 it leaves twelve traps to be opened.

25 Q Now, your doors now on your commuter equipment are

2 all sliding doors without any traps at all and your platforms  
3 are high-level platforms, isn't that so, Mr. Forbes?

4 A No, sir.

5 Q On the Harlem Division?

6 A No, sir.

7 Q Mr. Forbes, I use that, I commute on that train  
8 every day.

9 THE COURT: You are not testifying.

10 MR. HERBERT: I object. I ask the jury to disregard  
11 the gratuitous remarks of Mr. Elkind, what he does.

12 A I am not presently stationed on the Harlem Division  
13 but, however, to the best of my knowledge there are no high-  
14 level stations from White Plains to Brewster or Dover Plains.

15 Q Maybe not north of that but on the commuting  
16 area --

17 THE COURT: White Dover Plains is a commuting area.  
18 Why get into an argument about that? We are talking about  
19 1969, we are not talking about now.

20 I assume a flush platform is considered desirable  
21 to everybody if you can have it.

22 THE WITNESS: Yes, sir.

23 Q Now, does the last sentence of that Rule 4157-A,  
24 which says that, "The employee must be alert at all times,  
25 particularly at stations, to take necessary action in the

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Forbes-Cross

2 event passengers attempt to board or leave the moving trains."

3 Is that interpreted as authorizing an employee to stand on the

4 lower step after he opens up the trap? Is that the proper

5 position to be in in accordance with that rule?

6 A Are you asking for my opinion of that?

7 THE COURT: Yes, he is asking for your opinion.

8 A Yes.

9 Q It is?

10 A Yes, sir.

11 MR. ELKIND: I wish to make a motion in the

12 absence of the jury with reference to this witness' testimony.

13 I want to have something read back first. I wonder if your

14 Honor will call a brief recess for that purpose.

15 THE COURT: All right, ladies and gentlemen,

16 stretch your legs for a brief minute.

17 (Jury Excused)

18 MR. ELKIND: Could you find for me the part of the

19 question that led to the witness' statement that now they

20 have or that they don't always have enough trainmen to cover

21 the traps.

22 THE COURT: I remember that statement. What do

23 you want to make a motion about?

24 MR. ELKIND: I move to strike it as not responsive

25 to any question that was asked but I want to make sure that

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2 I'm proper and it is an appropriate motion. I may have asked  
3 for it. I don't know.

4 THE COURT: All right.

5 (Record read)

6 MR. ELKIND: I move to strike the last answer  
7 that the witness gave as not responsive to any question that  
8 I asked him.

9 THE COURT: It seems to me it is responsive, if  
10 you are probing him as to what guidance the rule gives as to  
11 when the door should open and he says in multicar trains  
12 they have to open before the train gets to the station.

13 The rule was perfectly obvious. The rule says  
14 nothing about when the doors should be open. You don't need  
15 the witness to tell you that. Then you were probing the  
16 witness as to what the practice was. It seems to me it is  
17 a perfectly natural reaction he had, which was to try to  
18 tell you what the practice was.

19 MR. ELKIND: Exception, your Honor.

20 THE COURT: I don't see it is very important  
21 one way or another.

22 MR. ELKIND: I don't think the case is going to  
23 revolve about it.

24 THE COURT: You want to consent to have it struck,  
25 Mr. Herbert?

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Forbes-Cross

2 MR. HERBERT: I see no need. He asked a question  
3 and didn't like the answer.

4 MR. ELKIND: I didn't ask the question. It was  
5 something the witness threw him.

6 THE COURT: It seems to me you were trying to  
7 probe the witness' interpretation of that rule. It was not  
8 what the rule said because you can read just as well as he  
9 can and he was trying to give you a working interpretation  
10 of it. I don't see it is relevant one way or another.

11 Are you through with the witness?

12 MR. ELKIND: If you will give me a second or two.

13 (Recess)

14 (In Open Court)

15 (Jury Present)

16 BY MR. ELKIND:

17 Q Mr. Forbes, is it a fair statement for me  
18 to make that at the time and place, that is, as the train  
19 approached 125th Street from the 138th Street bridge on March  
20 15, 1969, with the two M.U. cars, with apparently one track  
21 in use, that under the interpretation of Rule 4157-A it was  
22 left entirely to the judgment of the employee who had the  
23 duty to do so to decide when he would open up the door, is  
24 that correct?

25 A I would say yes, after his train had cleared the

1 rd/lf/54

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Forbes-Cross

2 bridge.

3 Q Once it had cleared the bridge, from that time  
4 under the rule he could use his judgment?

5 A I would say yes.

6 Q All right. Now, you had had information with  
7 respect to the stonings before March of 1969 that had come  
8 to you from your corporal?

9 A Yes, sir.

10 THE COURT: That is, you don't recollect it but  
11 you assume you must have.

12 THE WITNESS: I must have, yes, sir.

13 Q Do you have the authority in your position as  
14 suburban train master to put bulletins on the bulletin  
15 board?

16 A Could you explain that futher? I'll tell you why  
17 I ask. You mean bulletins, per se bulletins?

18 Q Do you from time to time put a bulletin on the  
19 bulletin board that carries your name underneath it?

20 A The word bulletin order on railroad property is a  
21 specific form, and only a division superintendent at that time  
22 could sign a bulletin order per se.

23 Now, there were many other things posted on a  
24 bulletin board that could be over anyone else's signature.

25 THE COURT: Could you put a sign on the bulletin

1 rd/1f/55

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2 board?

3 THE WITNESS: Yes, sir, I could.

4 Q You could put a sign?

5 A Yes, sir.

6 Q Did you at any time prior to March 15, 1969, put  
7 any sign up with respect to stonings?

8 A No, sir.

9 Q Now, you also told us earlier on in your testimony  
10 that in addition to the rules, that when there is some local  
11 condition that applies only to a particular division or  
12 region that it can be expressed or described in the timetable?

13 A That's correct.

14 Q And how frequently did the timetables come out?

15 A At that time approximately every six months, it  
16 would change from Eastern Standard Time to Laylight Saving  
17 Time and the reverse.

18 Q And do you have any input into what goes into --  
19 or did you at that time?

20 A Yes, sir.

21 Q Did you suggest as part of your input as the  
22 suburban train master at any time any notice or comment  
23 with respect to stonings?

24 A No, sir. They were so infrequent I felt it not  
25 necessary.

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Forbes-Cross

2 MR. ELKIND: Move to strike it, "they were so  
3 infrequent."

4 THE COURT: I will let it stand.

5 MR. ELKIND: That is all, your Honor.

6 THE COURT: Don't answer this question until  
7 either counsel have had a chance to say they don't like it  
8 if they don't like it, but we have had about eight stonings  
9 mentioned here in the period of how long?

10 MR. ELKIND: Ten months.

11 MR. HERBERT: I think a ten-month period from  
12 May 11, 1968.

13 THE COURT: Now you can answer this questions yes  
14 or no. Do you have any knowledge or information-- and this  
15 question is just yes or no -- do you have any knowledge or  
16 information whether that ten-month period was higher than the  
17 average for the past ten years or not?

18 THE WITNESS: In that particular location?

19 THE COURT: Yes. Do you have any knowledge or infor-  
20 mation on the subject?

21 THE WITNESS: No.

22 THE COURT: Then there wouldn't be a next question.

23 THE WITNESS: I could answer that based on my  
24 experience but not on specific knowledge.

25 THE COURT: I don't understand what you mean.

1 rd/lf/57

2 THE WITNESS: If you want me to say either yes  
3 or no based on facts that I have, I can't answer the question.  
4 But if you want me to answer yes or no based on my experience  
5 I can answer the question.

6 THE COURT: Okay. Now don't answer this question  
7 until they have had a chance to object. Based on your ex-  
8 perience would you say they were higher or lower or the same  
9 as for the past ten years?

10 Wait a minute. Anybody object to that question?

11 MR. HERBERT: We are speaking, your Honor, on the  
12 elevated track area?

13 THE COURT: Elevated track area we have been  
14 talking about.

15 THE WITNESS: Can I answer it?

16 THE COURT: Any objection?

17 You may answer.

18 THE WITNESS: I would say basically no change.

19 THE COURT: Basically the same as over the past  
20 ten years?

21 THE WITNESS: Yes.

22 THE COURT: Any redirect?

23 BY MR. ELKIND:

24 Q Your duties don't include any actual work on the  
25 trains, do they?

1 rd/lf/58

2 A Yes, sir. My duties require me to observe all  
3 employees while on duty on trains, but specifically to do  
4 things on trains myself, no, other than observe that they did  
5 them properly.

6 THE COURT: Do you ride on trains from time to time  
7 for that purpose?

8 THE WITNESS: Everyday, sir.

9 THE COURT: Anything further?

10 MR. HERBERT: No further questions.

11 THE COURT: You may step down.

12 (Witness Excused)

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1 rd/lf/l

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2 TERESA M. BURNS

3 vs.

4 PENN CENTRAL CO.

4500  
69 Civ. ~~750~~

5 September 16, 1974  
6 10:00 A.M.

7 THE COURT: Mr. Herbert, you have two pending motions  
8 and I take it you urge them?

9 MR. HERBERT: Yes. I would renew the motions  
10 made at the end of the plaintiff's case and renew the motions  
11 I made at the end of the entire case and I would ask the  
12 Court for a directed verdict dismissing the complaint.

13 In my view, your Honor, there was absolutely no  
14 proof that this unfortunate shooting was foreseeable and there  
15 was no showing whatsoever that the railroad was negligent. We  
16 could not have anticipated this I think as a matter of law.

17 The Court recognizes that the law is that the  
18 railroad is not an insurer of the safety of its employees.  
19 I think that is particularly true in this unfortunate occurrence.

20 The Court already knows what my views are with  
21 respect to the admissibility of the stonings in this case,  
22 but since it was part of the evidence I would call to the  
23 Court's attention that four of those eight stoning incidents  
24 occurred at points which were not close to the area we are  
25 dealing with. I think they were stonings -- four stonings in

1 rd/lf/2

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2 the vicinity of 103rd or 102nd Street to 106th Street. It is  
3 obvious at that point no crewman would open train doors or  
4 would likely be on vestibule platforms.

5 With respect to the stonings in the area I would  
6 call to the Court's attention that the last stoning in that  
7 area prior to this occurrence was 194 days before. Neighbor-  
8 hoods change in short periods of time within several blocks.  
9 There was no showing that the one person who was injured was  
10 injured in the vestibule of the car.

11 I feel that even if we were to consider those  
12 stonings, the likelihood of injury to any person or our  
13 train in this area I think was demonstrated to be thirty-three  
14 million to one, and, my goodness, if the railroad is to be  
15 held responsible or to have foreseen the likelihood of an  
16 injury when the odds are such, then I would submit that we  
17 are then to be held insurers, contrary to what the law says.

18 I would feel that the Court should be guided by  
19 Hartel, which did say, at least the circuit court here did  
20 say, that to hold a railroad responsible on the question of  
21 foreseeability, the railroad must have foreseen the likelihood  
22 of an attack by armed criminals, and they spoke of a special  
23 danger at a particular location.

24 Just for the sake of argument, your Honor, was  
25 one of shooting. What if it were some youngster with a mortar

2 gun, that just lobbed a mortar on one of our trains, would we  
3 be chargeable with the notice of the likelihood of such an  
4 occurrence? Is that on the basis of stonings?

5 I submit that as a matter of law, your Honor, this  
6 accident was not foreseeable and the railroad was not  
7 negligent, in whole or in part, for this unfortunate occurrence,  
8 and I would ask the Court to direct a verdict in favor of the  
9 defendant and that you grant my motions that were made at the  
10 end of the case.

11 THE COURT: Mr. Elkind.

12 MR. ELKIND: If the Court please --

13 THE COURT: By way of prefatory comment, my  
14 inclination is to grant Mr. Herbert's motion.

15 MR. ELKIND: Would your Honor give me an opportunity  
16 to try to persuade you to the contrary?

17 THE COURT: That is why I mentioned it.

18 MR. ELKIND: Let me say frankly to your Honor that  
19 if this were an ordinary negligence action where it was not  
20 the employer-employee relationship that existed between the  
21 defendant and plaintiff, and if we were not dealing with the  
22 duties imposed on the railroad by the decisions under the  
23 Federal Employer's Liability Act, I don't think there would  
24 be any question about the problem that confronts your Honor.

25 THE COURT: Why do you think there would be no

1 rd/lf/4

2 question?

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3 MR. ELKIND: Because I think that in an ordinary  
4 situation where you do have to establish an element of  
5 foreseeability --

6 THE COURT: What case do you rely on that you  
7 don't have to do it under F.E.L.A.?

8 MR. ELKIND: You have an element of foreseeability,  
9 but if your Honor will examine the Gallick case against  
10 the B. & O. It is referred to in my memorandum and I think  
11 it is the controlling case on foreseeability. 372 U.S. 108.

12 Gallick was a track laborer working for the B. & O.  
13 and they were doing work in the area of a marsh. Now, that  
14 marsh apparently contained some dead animals and some insects  
15 that were nurtured by that condition, apparently bit Gallick's  
16 leg.

17 THE COURT: That is the same rule of regular  
18 tort law. That is the eggshell case.

19 MR. ELKIND: No, it is not, your Honor. It deals  
20 with foreseeability.

21 THE COURT: Foreseeability of consequences.

22 Go ahead and give me your opinion.

23 MR. ELKIND: The judge in that case elicited special  
24 answers. He submitted interrogatories and he got special  
25 answers from the jury, and one of the answers, the jury found -

2 although they found for the plaintiff, they also found  
3 there was no reasonable foreseeable causal relationship  
4 between an insect bite and the physical condition of the  
5 plaintiff. And on the basis of that finding the Court,  
6 somewhere in the state court, granted judgment N.O.V.,  
7 and Gallick then appealed and Judge White, who wrote the  
8 prevailing opinion, said that the Court ha' applied too  
9 strict a doctrine of foreseeability. Although, he said  
10 foreseeability is an element in an F.E.L.A. case, it is  
11 not the kind of strict notice foreseeability that is generally  
12 considered to be applicable in negligence cases.

13 THE COURT: Well, the reason I didn't do what I  
14 am now going to do, read the whole case, is language.  
15 "Such a tort feasor would compensate his victim for even  
16 improbable, unexpected consequences is a wrongful act." Any  
17 tort feasor has to do that. You are saying that the Court  
18 was saying there was something different.

19 MR. ELKIND: The exact language I don't trust  
20 myself with, but it is to the effect that the tests of  
21 foreseeability in an F.E.L.A. case are different and more  
22 relaxed than in the regular case.

23 THE COURT: The reason I didn't go any further  
24 because the language you quote would be applicable to any tort  
25 case.

1 rd/lf/6

2 MR. ELKIND: Here is the quote: "The fact that  
3 the railroad may not have had a 'specific reason' for  
4 anticipating a mishap or injury to plaintiff, is a far too  
5 narrow, concept of foreseeable harm to negative negligence  
6 under the Federal Employer's Liability Act."

7 THE COURT: Where do you see that?

8 MR. ELKIND: Page 121 in the Gallick case.

9 THE COURT: Where is it in your brief?

10 MR. ELKIND: My brief, page fifteen.

11 THE COURT: I will have to get the case.

12 MR. ELKIND: The fact that this jury, after  
13 deliberating for, I guess, about a day, a jury of six people  
14 were unable to reach a unanimous verdict, indicates to me  
15 that there is a question in this case upon which reasonable --  
16 minds of reasonable men may differ.

17 THE COURT: As Mr. Justice Whittaker observed, he  
18 hates to agree with the majority which threw the case out  
19 because he regards his dissenting brethren as reasonable  
20 persons. So I think the fact I may associate the two dissent-  
21 ing jurors with Justices Black, Justice Brennan and Chief  
22 Justice Warren, I assume that those four justices are equally  
23 reasonable as the jurors.

24 MR. ELKIND: In any event, I would respectfully  
25 submit, your Honor, that a carrier such as the Penn Central

1 rd/lf/7

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2 could very well anticipate from the fact that there were  
3 these stonings during a relatively brief period, a ten-month  
4 period, and the last stoning was much closer to the date of  
5 this accident than counsel suggests. He has repeated that a  
6 number of times, but the last stoning was on January 20, 1969,  
7 and Mr. Burns met his death on March 15, 1969.

8 THE COURT: I don't think the date of the stonings  
9 is that important.

10 MR. ELKIND: But it is only forty some odd days.

11 Mr. Herbert said 160 days or something.

12 MR. HERBERT: Mr. Elkind, I was pointing out to the  
13 Court that in the area of 125th Street to 130th Street where  
14 crewmen are likely to open doors, the last stoning in that  
15 area was 19<sup>1/4</sup> days before.

16 MR. ELKIND: You are talking about even a more  
17 restrictive test now for alerting the railroad to the fact  
18 that there was a problem in this area.

19 (Pause)

20 THE COURT: Now that I have seen this case, I  
21 don't see that it adds anything to the general tort law.  
22 This case found that apparently the railroad permitted a filthy  
23 pool, breeding insects, to exist. And all this case says is if  
24 you do that, you are on notice that your employees may get  
25 sick. You don't have to be on notice of the --

1 rd/lf/8

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2 MR. ELKIND: This was not on railroad property,  
3 as I understand it. It is just in the general area where  
4 they had to do their work.

5 THE COURT: I'm not going into why they found that  
6 they were responsible for that pool because that is not your  
7 issue. They found that they were responsible for that pool,  
8 and the jury said they found them responsible for that pool,  
9 for the condition of that pool, and that wasn't the issue  
10 in the Supreme Court. But, said the jury, they couldn't  
11 have anticipated that somebody would have died, would have  
12 gotten so seriously sick. That is the eggshell, pure and  
13 simple the eggshell theory.

14 If you should anticipate some injury, and obviously  
15 if you have an insect breeding pool, you have to anticipate  
16 some injury. Once you have to anticipate some injury, the  
17 fact that it is extraordinary, out of all proportion is no  
18 defense.

19 MR. ELKIND: You see, your Honor, in this bug  
20 bite case there was absolutely no evidence of anybody ever  
21 having been bitten by a bug in that area. That was not part  
22 of the case.

23 THE COURT: If you have, in effect, a pool, you  
24 don't need evidence that somebody is likely to be bitten.

25 MR. ELKIND: Harlem with the stonings is the infected

1 rd/1f/9

226A

2 pool in this case.

3 THE COURT: I don't see the relationship between a  
4 stone and a gun.

5 MR. ELKIND: You see no relationship between a  
6 stone and a gun?

7 THE COURT: Yes.

8 MR. ELKIND: Why did your Honor go through this  
9 for four days or five days?

10 THE COURT: To let you get the opportunity to get  
11 the case before the Court of Appeals. That is why I had to  
12 do it. I told you when I let that evidence in I had grave  
13 doubt as to whether it should go in, but if I threw it out  
14 there would be no way of getting before the Court of Appeals.  
15 Now there is a way of getting it before the Court of Appeals.

16 MR. ELKIND: Was it your Honor's intention to  
17 set aside the verdict and grant judgment N.O.V. after the  
18 verdict?

19 THE COURT: My intention wasn't clear on that.  
20 My feeling was that should be done, but it didn't make any  
21 difference whether I did it or not as to its appealability.  
22 I might very well have put the railroad in a position of making  
23 them have the burden of appealing. That would have been  
24 probably a wrong thing to do but a practical result.

25 MR. ELKIND: Your Honor had then decided this case

1 rd/lf/10

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2 was not to result in a judgment for my client before we came  
3 in here?

4 THE COURT: We don't have to resolve that problem.  
5 I might have let the judgment stand just so the railroad would  
6 have had the burden of appealing, because everybody agreed it  
7 was going to be appealed one way or another. I might have  
8 then put that burden on the railroad. My feeling was I  
9 thought there was no case, as I think I had indicated to you.

10 MR. ELKIND: Has your Honor read the submission of  
11 the plaintiff, our trial memorandum?

12 THE COURT: Yes, I have read this. I told you when  
13 I read it I didn't get the urgent case.

14 MR. ELKIND: Because we have distinguished the  
15 Hartel case very carefully.

16 THE COURT: You should.

17 MR. ELKIND: The Hartel case is discussed at .3  
18 beginning on page seventeen.

19 (Pause)

20 MR. ELKIND: Now, in the Hartel case there was an  
21 offer of fourteen admitted -- I think it was fourteen, could  
22 have been twelve -- admitted holdups on the Long Island Railroad  
23 at various stations in which ticket agents had been robbed.  
24 None of those holdups were of the Mineola station where Mr.  
25 Hartel was killed.

1 rd/1f/11

228A

2           Judge Levett's view was that these all should  
3 be excluded because none of them were at Mineola. Now, that,  
4 of course, is different from what your Honor is doing. Here  
5 you are making a qualitative distinction about the nature of  
6 the risk and the nature of the third party assault, where  
7 as Judge Levett, whose views I sharply disagreed with, of  
8 course --

9           THE COURT: Obviously.

10          MR. ELKIND: -- but at least Judge Levett was  
11 talking about a locus in quo. He had a place he was concerned  
12 about. He insisted on excluding that evidence because none  
13 of it was at the Mineola station.

14          Now, your Honor took care of that hurdle, because  
15 there are, Lord knows how many stonings in the record of  
16 the police department, none of which have been shown in evi-  
17 dence here or even put in the record for your Honor's con-  
18 sideration. But there were stonings all over this railroad,  
19 not only in the Harlem area. But your Honor did narrow down  
20 the admissible incidents to those eight, which were at a  
21 relatively reasonable time before the accident and to a  
22 distinct locus, and area, and I think that by doing that  
23 you certainly brought yourself and brought your rulings  
24 within the Lillie case rather than the Hartel case.

25          Now, in the Lillie case, the reason the Lillie case

1 rd/lf/12

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2 went to the Supreme Court, and you are familiar with that,  
3 I guess. The Lillie case was the person who was attacked  
4 at the freight yard at night where they used to have bums  
5 and hangers-on and hobos around in the yard, and she was  
6 attacked one night when she opened up the door to take a  
7 message, thinking that she had a message and the hobos came  
8 in and beat her.

9 Now, the Supreme Court said that the railroad  
10 was responsible for that failure to furnish a reasonably safe  
11 place to work. They said that the defendant in the Lillie  
12 case should have anticipated that at that place by virtue  
13 of the fact there were these hobos, they are charged construc-  
14 tively with knowledge of it and they should have taken some  
15 precautions.

16 Our case is very much like the Lillie case; you have  
17 a dangerous area and there were things --

18 THE COURT: I see no evidence that this was a  
19 dangerous area. That is the point, to anticipate this kind  
20 of danger.

21 MR. ELKIND: Stonings, your Honor.

22 THE COURT: It just doesn't seem to me to follow  
23 just because kids throw stones --

24 MR. ELKIND: That is a question for the jury. That  
25 is not for your Honor to pass on. That is what you are doing.

2 THE COURT: That is the whole question that the  
3 Court of Appeals has to decide sometime.

4 MR. ELKIND: You are passing on a question of fact  
5 that should be passed on by a jury.

6 THE COURT: That is what the Court of Appeals  
7 has to decide sometime and it seems to me that they should  
8 decide it now as any other time.

9 I have given careful thought over the weekend  
10 to this matter, and it seems to me we are bound by the  
11 fair implications of the Hartel case as I have read it and  
12 reread it. To be sure the Hartel case was intended to --

13 MR. ELKIND: En banc the judges went for the posi-  
14 tion of rehearing.

15 THE COURT: That is very unfortunate. Three judges  
16 voted for a rehearing and it didn't get me anywhere.

17 Who were the three judges that voted for rehearing?

18 MR. ELKIND: They should be in a special shrine  
19 in my heart but I don't remember.

20 THE COURT: It is not indicated in the record  
21 that it happened at all. It just said argued 25th, decided  
22 the 29th. That is all it says. It says nothing about rehearing.

23 Anyway, that is beside the point. But in the Hartel  
24 case they found as a matter of law that the circumstance that  
25 robberies had taken place within the reasonably recent past

1 rd/lf/14

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2 at a variety of railroad stations within, as I recollect it,  
3 five or twenty miles of Mineola was without relevance to the  
4 danger of a robbery in Mineola.

5 Well, to my way of thinking, and whether I am  
6 right or wrong is for the Court of Appeals to decide, from  
7 my way of thinking there is more relationship for a robbery  
8 within five miles and between a stoning in the same place  
9 of a shooting.

10 The record in this case seems to be kind of an  
11 artificially slanted thing in the plaintiff's favor, because  
12 the record suggests that these stonings are of a recent  
13 vintage and they also suggest that the crew didn't know any-  
14 thing about it. I know of my own knowledge that these  
15 stonings have been going on for years.

16 MR. ELKIND: Your Honor, I take exception to that.  
17 I don't think that is a proper statement to put in this  
18 record.

19 THE COURT: I think it is. It is an observation  
20 which I think I am entitled to make. I know of my own know-  
21 ledge from reading the newspapers that these stonings have  
22 been going on for years. I can remember incidents of it when  
23 I used to ride on the railroad, and I can't believe that every-  
24 body in the railroad wasn't aware of it.

25 Aside from that fact, that fact has nothing to do

1 rd/1f/15

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2 with the record on which I have to decide. But just as the  
3 relationship between the Hartel case and this case, if  
4 robberies within an area beginning five miles from the  
5 general area are not sufficient to put a railroad on notice  
6 that it should protect its employees against the possibilities  
7 of robbery in a similarly situated station, it seems to me  
8 a fortiori that stonings, which there is not a scintilla of  
9 evidence that a single stone was ever thrown at anybody in a  
10 vestibule, the stones being thrown by kids, I see does not  
11 suggest to any rational person that somebody may shoot a gun  
12 at somebody.

13 Now, it is significant in the Hartel case, the  
14 plaintiff offered, and his offer was rejected, evidence that  
15 the union had sought to complain about this specific situation.

16 Here the evidence is to the contrary. The evidence  
17 is that despite the fact that obviously the crew on the train  
18 stoned knew about it, obviously the men on the train stoned  
19 knew about it, whether anybody else knew about it, and yet  
20 no union representative ever thought to raise the question  
21 that something ought to be done to change the practice that  
22 had gone on for 30 years.

23 On the contrary, in Hartel the union representatives  
24 had sought to raise the question that something ought to be  
25 done to change this practice, and the Court found that that was

2 unsufficient to put the railroad on notice.

3 MR. ELKIND: Your Honor, in the Hartel case, I  
4 want to correct the record in a couple of instances.

5 First, in the Hartel case Judge Levett excluded  
6 the proffered testimony by the collective bargaining agent  
7 which was a request for some safer ways of handling the  
8 ticket agents' business. In the examination of the collective  
9 bargaining agent before his testimony was permitted -- before  
10 the judge ruled on whether or not his testimony was admissible,  
11 it developed that when the collective bargaining agent was  
12 talking to management about the safeguards that should be  
13 taken, he was not talking only about Mineola. He was talking  
14 about all of the ticket agents, and, therefore, Judge Levett  
15 excluded that testimony. I disagreed with it but that happens  
16 to be what occurred. That was not a part of the evidence,  
17 that was not anything that the judge considered in passing on  
18 the motion for a directed verdict.

19 Now, in this case, in this case your Honor should  
20 know that in response to the stonings the legislative represen-  
21 tative of the union did seek, not to have anything done that  
22 would affect this rule, but they did seek some legislation.  
23 There have been attempts made on this railroad and on the  
24 railroad to have safeguards taken that have nothing to do with  
25 this case, but I don't know why you are bringing this up.

1 rd/lf/17

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2 It is no part of this case.

3 THE COURT: Because the dissent relied on it in the  
4 dissent and thought that was probative. The situation is just  
5 the opposite in this case. The union made no such suggestion.  
6 The dissent in the Hartel case, and I think if I had been on  
7 the Court with Judge Hayes you would have been in clover. I  
8 think I would have agreed with him in Hartel, but he relied  
9 on things which are not involved in this case. He took the  
10 position that the fact that the union had spotted this danger  
11 should be taken as a possibility that the railroad  
12 should have spotted it.

13 Here that fact is not only not present but the  
14 contrary has been established. It has been established the  
15 union never spotted any such danger. No suggestion was ever  
16 made that this practice be changed.

17 Now, you say --

18 MR. ELKIND: Well, you couldn't possibly introduce  
19 what did occur. I mean there were responses. They happen to  
20 be legislative and they were triggered by the entire system.

21 THE COURT: Now, you brought up the question of  
22 legislative response and you told me they have nothing to  
23 do with this problem. It seems to me that tends to strengthen  
24 the railroad's position. The legislation wouldn't have affected  
25 this problem. That seems to me that fortifies the railroad's

1 rd/lf/18

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2 position.

3 MR. ELKIND: I disagree with your Honor's analysis.

4 THE COURT: Everybody would like to get legislation  
5 passed if it would work to stop people stoning, no question  
6 about that. But the issue is would any rational person think  
7 that because of the stoning this 30-year old practice should  
8 be changed. In the Hartel case there was evidence that the  
9 union had suggested that the practice there involved should  
10 be changed. Judge Hayes, and as I said, you would have been  
11 in clover if the president thought of me earlier and put me  
12 in the higher court, I would have agreed with Judge Hayes,  
13 that the fact that the union made that suggestion should have  
14 been grounds for thinking that maybe the railroad should have  
15 come to the same idea.

16 Here we have no such thing.

17 MR. ELKIND: Your Honor, you don't decide questions  
18 of law that are as vital and important as this basic and under-  
19 lying question is by reference to these varied fact patterns  
20 in that case.

21 THE COURT: That is how you do decide questions of  
22 law.

23 MR. ELKIND: I sharply disagree, your Honor. This  
24 is a social welfare, if I may use that term, legislation --

25 THE COURT: You so charged the jury and I thought I

1 rd/1f/19

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2 was very gentle with you. What you were asking the jury to  
3 do is violate their oath of office.

4 MR. ELKIND: I was suggesting to the jury and am  
5 now suggesting to your Honor that this legislation in terms  
6 of what is meant by using reasonable care with furnishing an  
7 employee his safe place to work is elastic and flexible and  
8 is intentionally so. And whenever there is any evidence at  
9 all to suggest that the railroad could do more than what they  
10 have done in a particular situation, then it is up to the  
11 community, it is up to the jury to decide.

12 THE COURT: The railroad can always do more than  
13 it has done. As Mr. Justice Whittaker pointed out they  
14 could have provided tanks for guards. There is never a case  
15 where the railroad couldn't do more. Perfectly obviously  
16 if the railroad had told this man to sit behind a barrier  
17 until the train gets into the station, he wouldn't have been  
18 shot. That is perfectly obvious. The question is was it  
19 foreseeable that he might be shot.

20 MR. ELKIND: There are other questions. You are  
21 oversimplifying this. Another thing that you have to look at,  
22 your Honor, in terms of reasonableness, reasonable care, is,  
23 let's assume that we have a risk that is very remote, very  
24 unlikely that any trainman going out onto a platform will be  
25 injured either by a missile, a stone or a bullet, very remote.

1 rd/1f/20

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2 However, you have to weigh against that, first whether the  
3 function of the employee is at all necessary, and here it  
4 was necessary at all that he be out at that time. Your Honor  
5 will agree with me on that.

6 Then the second --

7 THE COURT: I don't agree with you either.

8 MR. ELKIND: It only takes a few seconds to drop  
9 down the trap.

10 THE COURT: Anyway, you told the jury that you  
11 didn't change -- all they had to do was tell him, you say.

12 MR. ELKIND: The second item is the expense to the  
13 railroad. That enters into the equation of reasonableness,  
14 too. Here it would cost them nothing, neither inconvenience nor  
15 money nor delaying their schedules to take that extra step to  
16 protect their employees, and that enters into the equation  
17 of reasonable care.

18 THE COURT: The evidence in this case is this  
19 procedure had been going on for 30 years, it had never occurred  
20 to a single human being to question it, and, therefore, I don't  
21 see why you can say the railroad should have questioned it.

22 MR. ELKIND: That is for the jury to decide, not  
23 for your Honor. It is a question of fact for the jury  
24 and that is the way --

25 THE COURT: If you are right on that, the Court of

1 rd/1f/21

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2 Appeals will reverse me.

3 MR. ELKIND: The last decision in the Court of  
4 Appeals in the Seventh Circuit that we started out in our  
5 brief with, did you read that?

6 THE COURT: I read it at the time. Let me look at  
7 it again.

8 MR. ELKIND: It is the Heater case. It appears in  
9 the last advance sheet. Heater against the C. & O. You know  
10 what it calls the charge that you are relying on that the  
11 railroad doesn't insure or is not an insurer for the safety  
12 of its employees? It calls it or refers to their statement  
13 of the principle as psiticassistic reference, which after  
14 some probing I found it means parrot-like.

15 Then they discussed the F.E.L.A. as it really is.  
16 Your Honor's view is directly contrary, your attitude toward  
17 this case --

18 THE COURT: That may be contrary to what the  
19 Seventh Circuit says but it doesn't seem to me to be contrary  
20 to what the Second Circuit says.

21 MR. ELKIND: Two judges.

22 THE COURT: Mr. Justice Douglas in dissenting stressed  
23 the very practice which is not present here, namely, the fact  
24 that the union thought it was negligent.

25 MR. ELKIND: They stressed it because I stressed it

1 rd/lf/22

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2 in my briefs. Don't hang on that because that was the point  
3 I raised to the Court.

4 THE COURT: The reason you raised them --

5 MR. ELKIND: There are other questions of fact  
6 here, your Honor.

7 THE COURT: The reason you raised them was that  
8 was all you had to raise.

9 As I said, the reason I let the case go to the  
10 jury is, this case has got to get to the Court of Appeals,  
11 as both sides agreed when we started.

12 My feeling was that the case should -- both sides  
13 said it should go to the Court of Appeals. My feeling was  
14 that it should go on a full record.

15 MR. ELKIND: Let's try it again and get a verdict.

16 THE COURT: We had a full record, as full as a  
17 record as there is any reason to believe will happen at any  
18 other time.

19 MR. ELKIND: I believe I could make a better  
20 record if I tried again.

21 THE COURT: I'm sure Mr. Herbert feels the same  
22 way. One record is enough.

23 As I say, had the jury found a verdict in your  
24 favor, I might have let it stand so as to put the burden of  
25 appeal on the railroad. That is impossible in this situation.

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1 rd/lf/22a

2 I expressed my doubts about the case and as I  
3 heard the case tried my doubts solidified to as much certainty  
4 as I am capable of having, and I will dismiss the complaint  
5 and grant the appropriate judgment.

6 Now, off the record.

7 (Discussion off the record)

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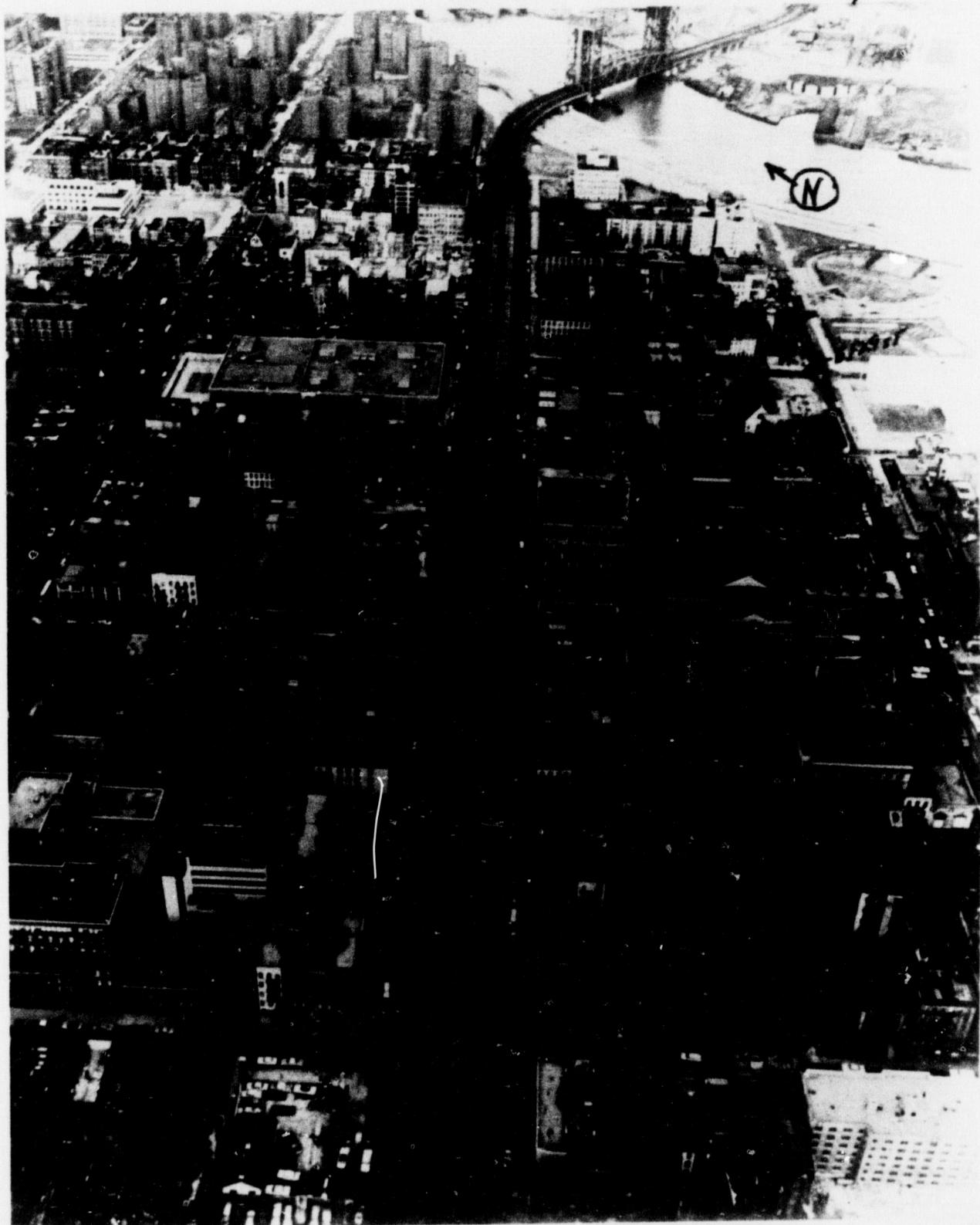
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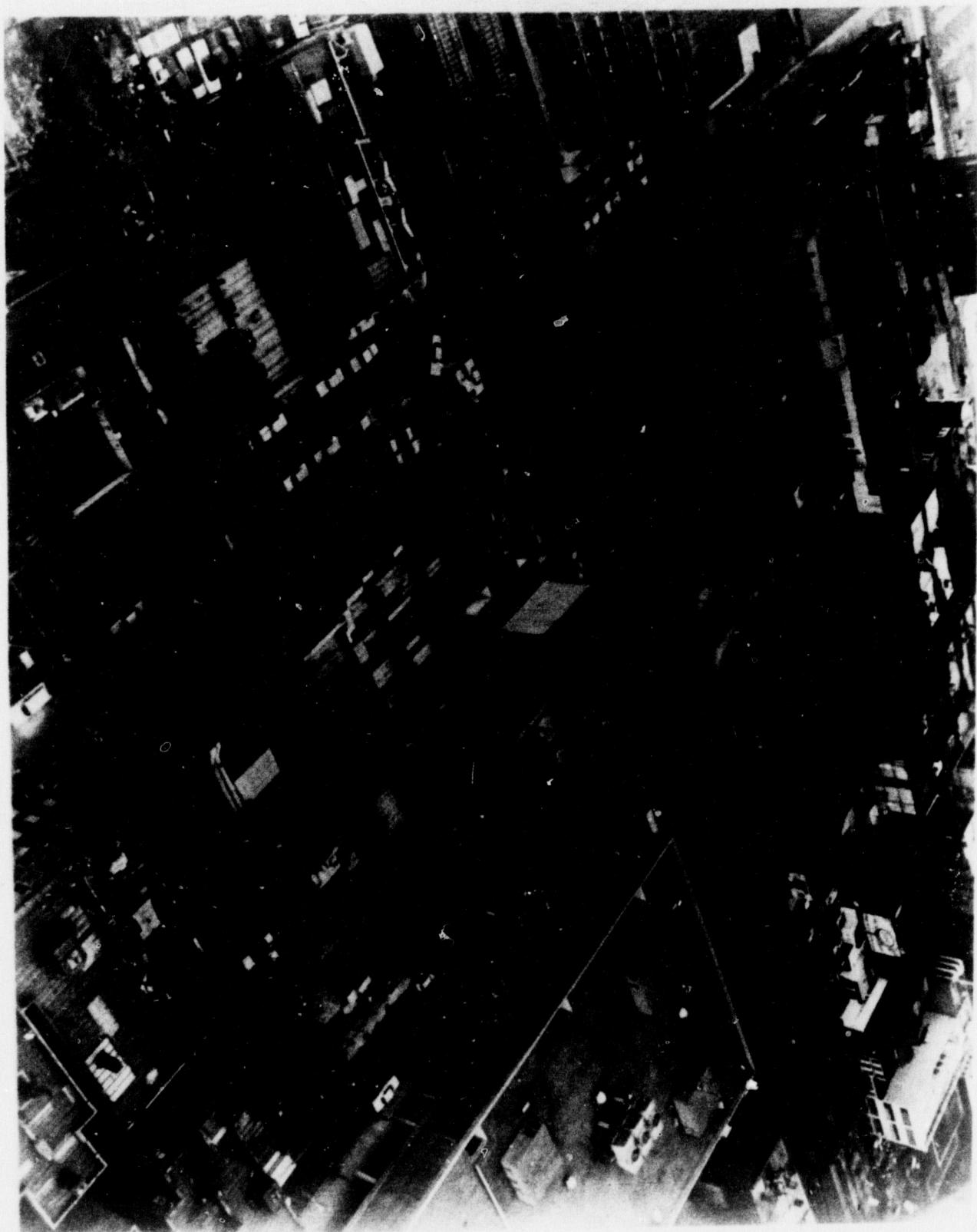
**241A**

PLAINTIFF'S EXHIBIT #1B

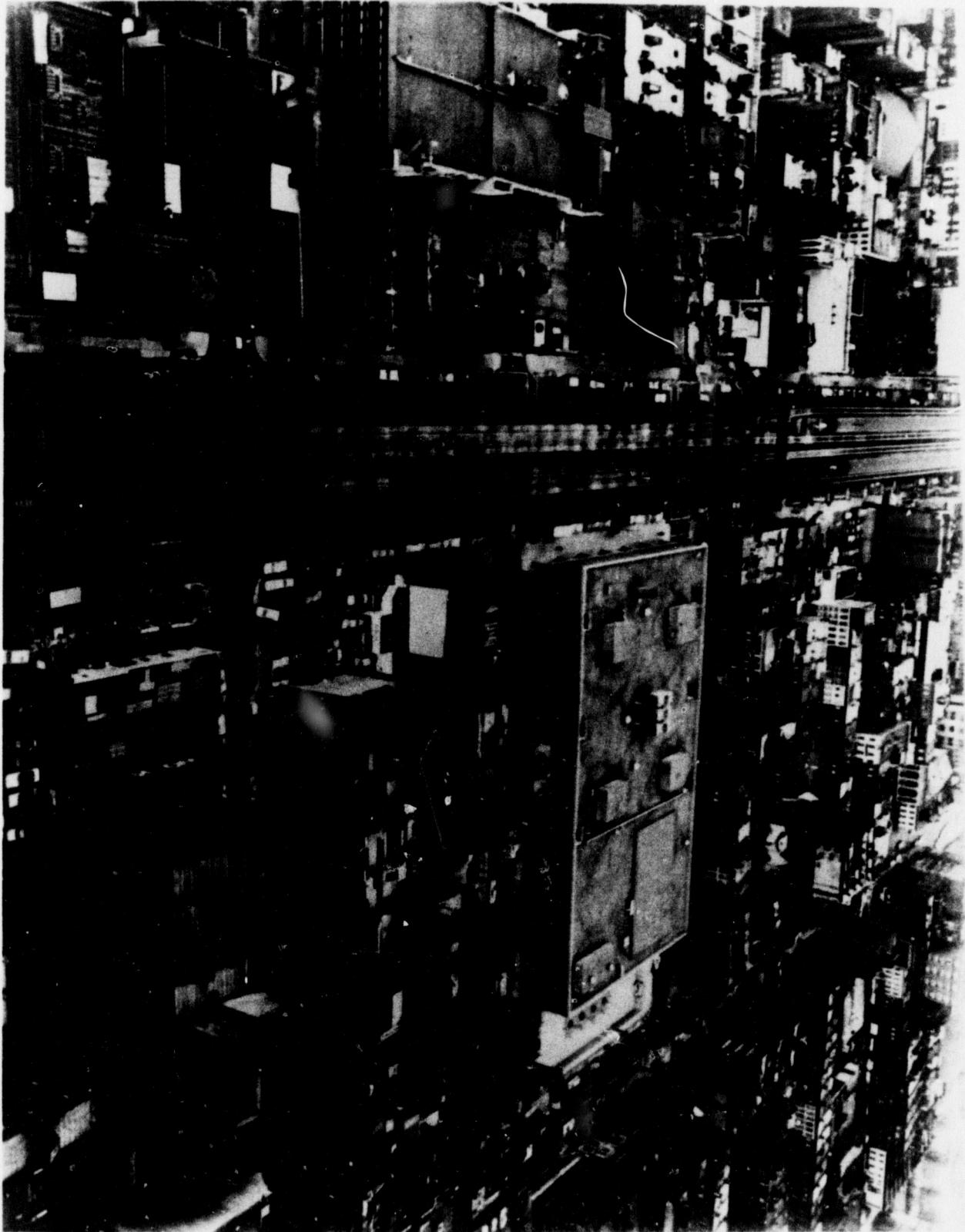


242A

PLAINTIFF'S EXHIBIT #1E

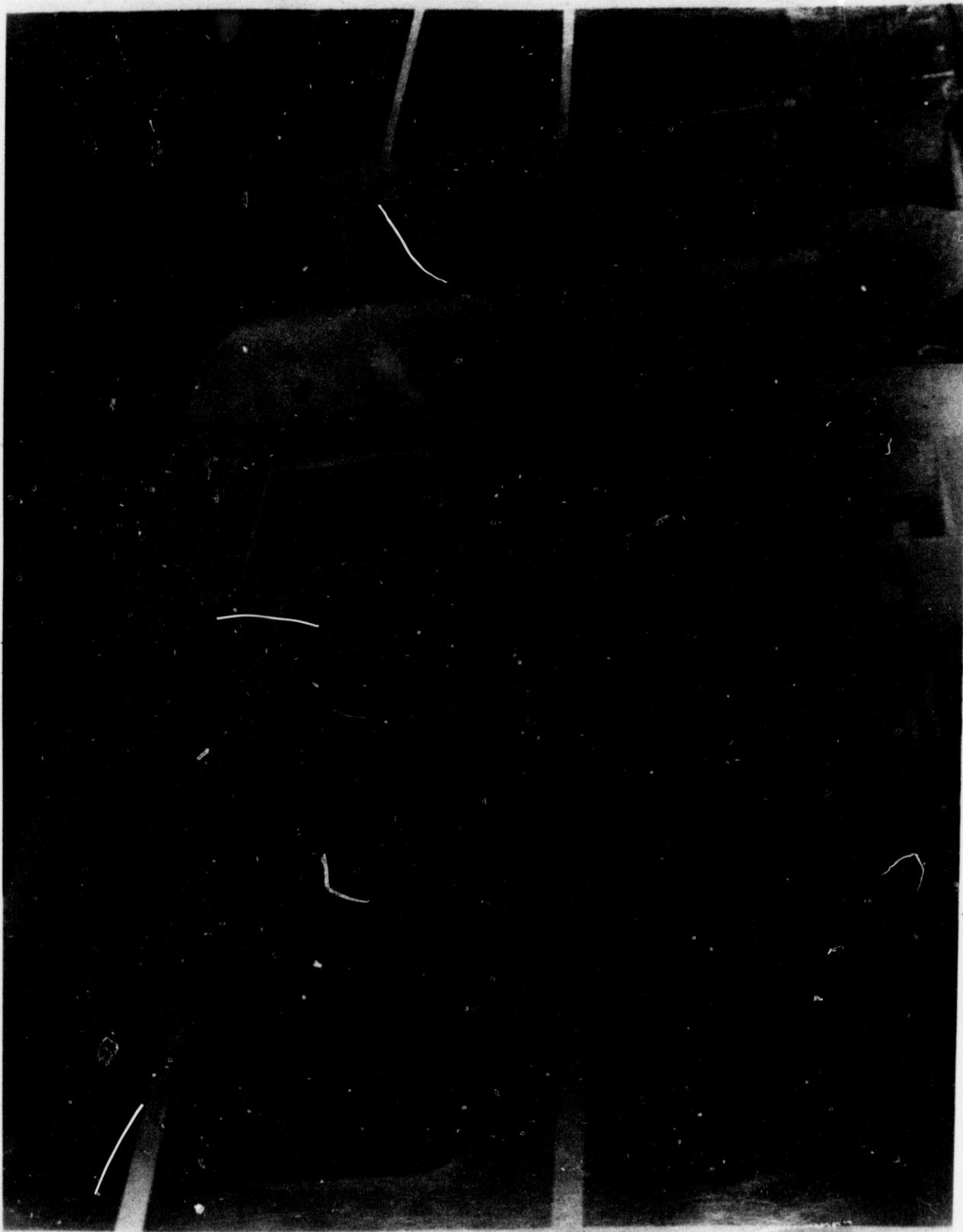


**243A**  
PLAINTIFF'S EXHIBIT #1F



**244A**

PLAINTIFF EXHIBIT #2



245A  
PLAINTIFF EXHIBIT #3



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

246A

SAME TITLE

69 Civ. 4500 (WK)

: JUDGMENT

: U.S. District Court

Filed

Sept. 20, 1974

S.D. of N.Y.

This action came on for trial before the Court and a jury, Honorable Whitman Knapp, District Judge, presiding, and the Court on motion of defendant having directed a verdict for defendant, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same is hereby dismissed and that the defendant have and recover its costs from the plaintiff.

Dated: September 18, 1974

/s/ Whitman Knapp  
UNITED STATES DISTRICT JUDGE

Judgment entered - 9/23/74  
Raymond F. Burghardt  
Clerk

247A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SAME TITLE

-x  
69 Civ. 4500 (WK)  
:  
NOTICE OF APPEAL  
:

-x  
S I R :

NOTICE is hereby given that Teresa M. Burns, as Administratrix of the Goods, Chattels and Credits of George Vincent Burns, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment dismissing the complaint in this action entered on the 20th day of September, 1974.

Dated: New York, N.Y.  
September 24, 1974

ELKIND, LAMPSON & SABLE  
Attorneys for Plaintiff

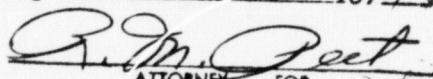
By /s/ ARNOLD B. ELKIND  
A Member of the Firm  
122 East 42nd Street  
New York, N.Y. 10017

TO:

ROBERT M. PEET, ESQ.  
Attorney for Defendant  
466 Lexington Avenue  
New York, N.Y. 10017



Service of 1 copies of this within  
Joint Appendix is admitted this  
26 day of November 1974.

  
R.M. Peet  
ATTORNEY FOR Defendant - Appellee